

United States
Circuit Court of Appeals

For the Ninth Circuit.

MATTHEW EDWARD DEADY, HANOVER
DEADY and THE FIRST NATIONAL
BANK OF PORTLAND, a national banking
association,

Appellants,

vs.

RICHARD HOWELL,

Appellee.

RICHARD HOWELL,

Appellant,

vs.

MATTHEW EDWARD DEADY, HANOVER
DEADY and THE FIRST NATIONAL
BANK OF PORTLAND, a national banking
association,

Appellees.

Transcript of Record

Upon Appeals from the District Court of the United
States for the District of Oregon.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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MAGUIRE, SHIELDS, MORRISON & BIGGS,
ROBERT F. MAGUIRE,

723 Pittock Block, Portland, Oregon, and

JOHN SCOBLE,

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for Appellee, and Cross-Appellant.

In the District Court of the United States
for the District of Oregon

July Term, 1937.

Be it remembered, that on the 22nd day of September, 1937, there was duly filed in the District Court of the United States for the District of Oregon, an Amended Bill of Complaint, in words and figures as follows, to wit: [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States
for the District of Oregon

In Equity No. E9641

RICHARD HOWELL,

Plaintiff,

vs.

MATTHEW EDWARD DEADY, HANOVER
DEADY and THE FIRST NATIONAL
BANK OF PORTLAND, a national banking
association,

Defendants.

AMENDED BILL OF COMPLAINT

Comes now the plaintiff and for cause of suit
against the defendants herein alleges as follows:

I.

That plaintiff is a citizen and resident of the
State of Connecticut and is one and the same per-
son as Richard Howell Busck, a son of Charlotte
Howell Deady, who is named in the last will and
testament of the said Charlotte Howell Deady as
her sole legatee and devisee, all of which more fully
appears from the last will and testament of the
said Charlotte Howell Deady hereinafter set out.

II.

That the defendants, Matthew Edward Deady
and Hanover Deady, are citizens and residents of
the State of Oregon.

III.

That the defendant, The First National Bank of Portland, is a national banking association organized and existing under the national banking laws of the United States of America with its office and principal place of business in the City of Portland, State of Oregon. [2]

IV.

That the controversy herein involves money and property rights exclusive of interest and costs of a value in excess of \$3,000.00.

V.

That on and before the 29th day of August, 1923, the said Lucy A. H. Deady was seized in fee of the following described real property located and situated in the City of Portland, County of Multnomah, State of Oregon, to wit:

Lot One (1), Block Two Hundred and Twelve (212) City of Portland, together with the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining.

That on or about said date the said Lucy A. H. Deady died leaving a last will and testament wherein and whereby she devised an undivided two-thirds of said real property, subject to certain conditions, charges and restrictions, to Henderson Brooke Deady, her son, and an undivided one-third thereof to her grandsons, the defendants Matthew Edward

Deady and Hanover Deady; that said will was duly and regularly proved, admitted to probate in the Circuit Court of the State of Oregon for Multnomah County, Probate Department, on the 5th day of September, 1923; that letters testamentary issued out of said court on the 15th day of September, 1923, to Joseph Simon and Henderson Brooke Deady as executor of the last will and testament of the said Lucy A. H. Deady, deceased, and administration of the estate of the said Lucy A. H. Deady was had thereunder; that said estate was closed and the executor discharged on the 6th day of March, 1936; that said last will and testament of the said Lucy A. H. Deady in words and figures is substantially as follows, towit:

In The Name of God, Amen: I, Lucy A. H. Deady, of Portland, Oregon, widow of the late Matthew P. Deady, make this the following my Last Will and Testament, that is to say: [3]

First: I will and direct that all my just debts and funeral expenses be paid.

Second: I request and direct that my body be interred by the side of my late husband, Matthew P. Deady, in Riverview Cemetery.

Third: Subject to the conditions, provisions and charges thereon hereinafter made, I give, devise and bequeath to my son Henderson Brooke Deady, the undivided two thirds of Lot numbered One (1) in Block numbered Two Hundred and Twelve (212) of the City of Portland, Oregon.

Fourth: Subject to like conditions, provisions and charges thereon, I give, devise and bequeath to my two grandsons, Matthew Edward Deady and Hanover Deady, the remaining undivided one-third of said Lot 1, Block 212, Portland, Oregon.

Fifth: I direct that from the income derived from said Lot numbered 1 in Block numbered 212, there be paid to Mary E. Deady, widow of my deceased son, Edward Nesbith Deady, the sum of \$150.00 per month during the term of her natural life, and that there be paid to Marye Thompson Deady, who was the wife of my son Paul R. Deady, the sum of \$75.00 per month, so long as she survives and remains unmarried.

I further direct that the remainder of the income derived from the real property, shall be distributed as follows:

(a) To the payment to each of my grandsons,—Matthew Edward Deady and Hanover Deady, the sum of \$100.00 per month, and the remainder of said income shall be paid to my son, Henderson Brooke Deady. Such division of the income derived from the said real property to continue during the lifetime of my son, Henderson Brooke Deady.

Provided further, that from the income derived from said real property, and before the distribution of the same, there shall be paid

therefrom, the inheritance tax properly chargeable against my estate, or the legacies or divisions made, and after the payment of such inheritance tax, there shall be created a sinking fund of not less than \$1000.00 nor more than \$2500.00 per year, in discretion of my Executors, for the purpose of retiring and paying off the mortgage debt created and existing against said Lot numbered 1 Block numbered 212.

Sixth: I will and direct that said Lot numbered One (1) in Block numbered Two Hundred and Twelve (212), Portland, Oregon, shall neither be mortgaged, partitioned, sold, or otherwise encumbered by my devisees except for the improvement of the same, until the expiration of twenty-five (25) years from the date of my decease, and the devises to my said son Henderson Brooke Deady, and to my grandsons, Matthew Edward Deady and Hanover Deady, contained in items three and four hereof, are upon the express condition that said property shall not be disposed of or encumbered during the period aforesaid. Provided, however, that said real property may be encumbered by mortgage to renew the present mortgage, or such portion thereof as may from time to time remain unpaid.

Seventh: That in the event my son Henderson Brooke Deady die without issue, the undivided two-thirds of Lot numbered 1 in Block numbered 212, shall vest in my grandsons here-

inbefore named, and I give and devise the same to my said grandsons. [4]

Eighth: I authorize and permit my son Henderson Brooke Deady, if he so elects to do, to bequeath by last Will and Testament to his wife, (if he then has a wife,) the income that would have been derived by him if living, from the two-thirds of Lot 1 Block 212, City of Portland. Such bequest to continue only during the life time of the widow of said Henderson Brooke Deady.

Ninth: The monthly payments directed to be made to my grandsons, and the residue of income directed to be paid to my son Henderson Brooke Deady, provided for in Item Fifth of this Will, shall *contue* for a period of ten years after my death, and thereupon and thereafter the net income derived from said Lot 1 in Block 212 of the City of Portland, shall follow the title and ownership of said real property, and shall be distributed, two-thirds to my son Henderson Brooke Deady, and the remaining one-third to my two grandsons, subject to the payment of the legacies bequeathed to Mary E. Deady and Marye Thompson Deady, in said Fifth item specified. It is my wish that my executors provide out of the residue of the income bequeathed to my son, Henderson Brooke Deady, in Item Fifth, funds at their discretion, to further any legitimate or worthy ambition or aim, other than business ventures, which my

grandsons Matthew Paul and Hanover or either of them, may undertake or entertain.

Tenth: I give, devise and bequeath to my son Henderson Brooke Deady, that certain parcel of real estate situated and being in Mountain View Park heretofore conveyed to me by my son Edward Nesmith Deady.

Eleventh: I give and bequeath to my grandson Hanover Deady my law library.

Twelfth: All the rest, residue and remainder of the property of which I shall be seized, of whatever nature and wheresoever situated, I give, devise and bequeath to my son Henderson Brooke Deady and to my grandsons Matthew Edward Deady and Hanover Deady; to Henderson Brooke Deady the undivided two thirds thereof, and to Matthew Edward Deady the undivided one-sixth thereof, and to Hanover Deady the remaining undivided one-sixth thereof.

Lastly: I hereby nominate and appoint my son Henderson Brooke Deady, and my friend Joseph Simon, of Portland, Oregon, to be the Executors of this my last Will and Testament, and also Trustees to manage my estate, and I direct that no bond or security shall be required of them as such Executors or Trustees. I also direct that in the event of the death, resignation or disqualification of all of my said Executors, and Trustees named herein, the Security Savings and Trust Company, of Port-

land, Oregon, shall then complete the execution of said Estate, and serve as Trustee thereof.

I hereby revoke all former Wills by me at any time made.

In witness whereof, I have hereunto set my hand and seal this the 29th., day of July, A. D. 1920, at Portland, Oregon.

(Signed) LUCY A. H. DEADY (Seal) [5]

The above instrument of writing was signed by Lucy A. H. Deady, the Testatrix therein named, in the presence of us, who at her request and in her presence, and in the presence of each other, have subscribed our names as witnesses thereto.

(Signed) CHESTER V. DOLPH
Residing at Portland, Or.

(Signed) J. V. BEACH
Residing at Portland, Or.

That plaintiff is informed and believes and therefore alleges that at the time of the death of the said Lucy A. H. Deady said real property, constituting the major portion of her estate, was profitably leased for a long period of years and was yielding substantial revenue; that plaintiff is informed and believes and therefore alleges that said lease is still in existence and has yet a number of years to run and that said property is now and ever since the death of the said Lucy A. H. Deady has been yielding revenues in excess of \$15000 per annum.

VI.

That the said Henderson Brooke Deady died without issue on or about the 28th day of May, 1933, leaving a last will and testament wherein and whereby he devised and bequeathed all of his property, real and personal, to his wife, Charlotte Howell Deady; that a copy of the last will and testament of the said Henderson Brooke Deady is marked Exhibit A, hereto attached and made a part hereof; that said last will and testament was, on the 18th day of July, 1933, duly and regularly proved and admitted to probate in the Circuit Court of Multnomah County, State of Oregon, Department of Probate, and administration of said estate commenced thereunder by letters dated July 18, 1933, appointing Robert H. Strong as executor thereof, who thereafter and on the 18th day of July 1933, duly qualified and became such executor.

VII.

That the said Charlotte Howell Deady died on or about the 12th day of July, 1935, leaving a last will and testament wherein and whereby she devised and bequeathed all of her [6] property, real, personal and mixed, of which she died seized, to the plaintiff, her son, otherwise known and named in said will as Richard Howell Busck; that a copy of said last will and testament of the said Charlotte Howell Deady is marked Exhibit B, hereto attached and made a part hereof; that on the 22nd day of July, 1935, said last will and testament of

the said Charlotte Howell Deady was duly and regularly proved and admitted to probate in the State of Connecticut and that on said date the plaintiff herein was appointed and qualified as executor of the said last will and testament of the said Charlotte Howell Deady as appears from the certified copy of the order of court, marked Exhibit C, hereto attached and made a part hereof.

VIII.

That there exists between the plaintiff and defendants herein an actual bona fide and justiciable controversy within the meaning of the provisions of T. 28 U.S.C.A. #400, which said controversy involves the construction and legal interpretation of the said last will and testament of the said Lucy A. H. Deady and depends for its determination upon a judicial declaration of the legal rights of this plaintiff thereunder; that the said controversy is substantially as follows:

(a) That the plaintiff, as successor in interest by successive testamentary devises of Henderson Brooke Deady as hereinbefore alleged, claims and asserts that he is the owner in fee of an undivided two-thirds of said Lot 1, Block 212, Portland, Oregon, and is entitled to two-thirds of the rents, profits and income therefrom, subject only to a charge thereon for payment of the legacies and annuities in said will contained from and after the 12th day of July, 1935, being the date of the death

of Charlotte Howell Deady from whom the plaintiff [7] has inherited.

It is the specific contention of plaintiff that paragraph 3 of the said last will and testament of **Lucy A. H. Deady** constitutes a testamentary gift in fee simple absolute and that the "conditions, provisions and charges" to which said devise is made subject, relate only to the conditions, charges and provisions contained in paragraphs fifth, sixth and ninth of said will to which the testamentary gift to defendants **Matthew Edward Deady** and **Hanover Deady** are likewise subject; that paragraph seventh of said will is not to be construed as any limitation on or reduction of the fee estate devised to **Henderson Brooke Deady** in paragraph 3; that the said paragraph seventh relates to and was applicable only on the contingency of the death of **Henderson Brooke Deady** prior to that of **Lucy A. H. Deady**; that this contingency did not occur and **Henderson Brooke Deady** became seized on the death of **Lucy A. H. Deady** of an estate of inheritance which he devised on his death to his widow, **Charlotte Howell Deady**, and which she, the said **Charlotte Howell Deady**, devised to this plaintiff, the said rightful owner thereof; that if paragraph seventh of the last will and testament of **Lucy A. H. Deady** did not refer to the contingency of the death of **Henderson Brooke Deady** prior to the death of the testatrix, it only provided for an executory devise to the two grandsons of **Lucy A. H. Deady** in case **Henderson Brooke Deady** died without issue; that the pro-

visions of said paragraph seventh of said last will and testament and said executory devise, contained therein, are invalid and void under the rule as to perpetuities.

That the defendants contend that under said will there was devised to the said Henderson Brooke Dedy a fee estate condition on his, the said Henderson as Henderson Brooke Dedy died without much as Henderson Brooke Dedy died without issue [8] said devise lapsed and Henderson Brooke Dedy acquired only a life estate with power to appoint his wife to succeed him for her lifetime in the enjoyment of two-thirds of the income therefrom; that consequently Charlotte Howell Dedy succeeded to only a life interest in two-thirds of the income from said estate of Lucy A. H. Dedy and had no estate of inheritance therein which she could devise or bequeath to the plaintiff.

(b) That the plaintiff further contends that the said defendant, the First National Bank of Portland, is without authority to manage said property and collect and disburse the profits and income therefrom since its discharge as executor of the estate of Lucy A. H. Dedy; that said right so exercised by the defendant, The First National Bank of Portland, is an incident of ownership and therefore accrues to the devisees or their successors upon the distribution of the property to them and the discharge of the executor; that the said last will and testament of the said Lucy A. H. Dedy does not create a valid or any trust since there is no

trust res conveyed to, settled upon, or vested in any person or persons for the benefit of another, and that the use of the word "trustee" in the last paragraph of said will in the absence of any language creating a trust is not sufficient to vest any persons or corporation therein named as "trustees" with any property, interest, title or right sufficient to constitute said persons as trustees or to clothe them with the power and authority of a trustee; that consequently the management of said real property by the defendant, The First National Bank, and the collection and disbursement of the income therefrom, is an invasion of the plaintiff's property rights and has resulted and will continue to result in pecuniary damage to plaintiff in a substantial amount.

(c) That plaintiff further contends that paragraph [9] sixth of said will is invalid, void and of no force and effect insofar as it purports to impose a limitation on the power of the devisees in said will named and their successors to partition, encumber or alienate the real property therein named and involved herein for an absolute period of twenty-five years after the death of the testatrix: that such attempted and purported limitation violates the rule against perpetuities and therefore must fail. That defendants assert and claim that said paragraph is valid and subsisting.

(d) That the plaintiff further contends that paragraph fifth of said will is invalid and void and without force or effect, under the rule as to per-

petuities, for the reason that the provision contained therein "That from the income derived from said real property, and before the distribution of the same, there shall be paid therefrom, the inheritance tax properly chargeable against my estate, or the legacies or divisions made, and after the payment of such inheritance tax, there shall be created a sinking fund of not less than \$1,000.00 or more than \$2500.00 per year, in discretion of my executors, for the purpose of retiring and paying off the mortgage debt created and existing against said lot numbered 1 Block numbered 212", provides for the accumulation from the income from said property, for more than lives in being, at the time of the death of the testator, plus twenty-one years. That said provision being invalid, void and of no effect, the provision for the payment of any legacies whatsoever, from the income from said estate, is also invalid and void.

IX.

That on or about the 14th day of February, 1934, one Joseph Simon, surviving co-executor and pretended "trustee" of the estate of Lucy A. H. Deady, died and the defendant, the [10] First National Bank of Portland thereupon and to-wit, the 27th day of February, 1934, was appointed and qualified as executor thereof and continued as such until the 6th day of March, 1936, when said estate of the said Lucy A. H. Deady was closed and the defendant, The First National Bank of Portland,

was discharged as executor thereof; that said defendant The First National Bank, ever since has and now does manage, operate and control the said real property first hereinabove described, and ever since has continued to and now does collect, receive and disburse the income therefrom as the pretended "trustee" of said estate; that said defendant The First National Bank of Portland, is without any lawful right or authority to so manage, control and operate said real property and to collect, receive and disburse the income and rentals therefrom and its acts in so doing are contrary to and in violation of the property rights of this plaintiff.

That the exact amount of moneys received by the defendant The First National Bank of Portland, since the said 6th day of March, 1936, and the disposition thereof by said defendant is to this plaintiff unknown, and plaintiff cannot ascertain and determine these matters without benefit of a discovery of and an accounting therefor; that plaintiff is informed and believes and therefore alleges that a substantial portion of said income has been and is being paid over to the defendants Matthew Edward Deady and Hanover Deady by the defendant The First National Bank of Portland; that plaintiff has made demand upon each of the defendants herein for an accounting of said income and profits from said real property and for payment to him, plaintiff, of his proportionate share thereof; that said defendants, and each of them, have wholly failed, neglected and refused to render an account-

ing to this plaintiff and [11] still do refuse to do so, and have wholly failed, neglected and refused to pay over to this plaintiff his proportionate share thereof or any moneys whatsoever and still do refuse to do so; and the defendants, and each of them, have denied and ignored and still do deny and ignore plaintiff's rights therein and thereto; that the defendant The First National Bank, has announced its intention to continue to manage, operate and control said real property and to collect, receive and disburse the rents and profits therefrom to the exclusion of plaintiff's interest and rights therein, and the defendants, Matthew Edward Deady and Hanover Deady, have announced their intention to continue to receive from the defendant The First National Bank of Portland the entire net income from said estate to the exclusion of plaintiff's rights and interests therein; that the defendants, Matthew Edward Deady and Hanover Deady, are without any appreciable income or assets other than their interest in the real property above described; and plaintiff is informed and believes that said defendants Deadys have dissipated and spent the moneys heretofore paid to them by the said defendant The First National Bank, and will continue to dissipate and spend the moneys paid to them by said defendant The First National Bank and are therefore and would be unable to respond in damages to this plaintiff.

That the acts of the defendants hereinabove alleged violate and invade the property rights of this

plaintiff and unless enjoined and restrained will continue so to do, all to the irreparable injury and damage of plaintiff; that in order to preserve and protect the property here involved and hold and maintain the income therefrom safe and secure pending the determination of the issues herein, it is necessary that a receiver be appointed, or in the alternative that the court [12] impound said income derived and to be derived from said property in the hands of said defendant The First National Bank under the supervision and orders of this court.

X.

That plaintiff has no plain, speedy or adequate remedy at law.

Wherefore, plaintiff prays:

1. That subpoenas issue herein directed to the defendants above named and each of them requiring said defendants and each of them to appear herein and true answer make to the allegations in this Amended Bill of Complaint contained.

2. For a decree of this court construing the last will and testament of Lucy A. H. Deady, and

- (a) Declaring that in and by paragraph Third of the last will and testament of Lucy A. H. Deady, deceased. Henderson Brooke Deady became vested in fee simple absolute in two-thirds of Lot numbered 1, in Block numbered 212, in the City of Portland, Oregon.

- (b) Declaring that by virtue of the devise and bequest of said interest in said property, from Hen-

derson Brooke Deady to Charlotte Howell Deady and the devise and bequest of said property by Charlotte Howell Deady to the plaintiff herein, said plaintiff is now the owner in fee simple of said two-thirds interest in Lot numbered 1 in Block numbered 212 of the City of Portland, Oregon.

(c) Declaring that paragraphs fifth, sixth, eighth and ninth of the last will and testament of Lucy A. H. Deady, deceased, are invalid and void.

(d) Declaring that paragraph seventh of the last will and testament of Lucy A. H. Deady provided for the contingency of the death of Henderson Brooke Deady prior to the death of the testatrix. That Henderson Brooke Deady died [13] after the death of Lucy A. H. Deady.

(e) Declaring that if paragraph seventh of said last will and testament did not provide for the contingency of the death of Henderson Brooke Deady prior to the death of Lucy A. H. Deady, that at the most, it was an executory devise only, and was invalid and void under the rule as to perpetuities.

(f) Declaring the plaintiff to be the true owner in fee simple absolute of an undivided two-thirds of Lot 1, Block 212, City of Portland, and to be immediately entitled to the joint control, management and operation thereof with the defendants Matthew Edward Deady and Hanover Deady, and to two-thirds of the income therefrom less such testamentary charges and legacies as the court may find to exist at the date of its decree.

(g) Declaring the defendant The First National Bank of Portland to be without lawful or any right to manage, operate or control, or to interfere with the management, operation or control of said real property, or to collect and receive or disburse any of the income therefrom, as trustee or in any other capacity whatsoever, and perpetually enjoining and restraining said defendant The First National Bank from continuing so to act.

(h) Appointing a receiver to assume the management, operation and control of said real property and to collect and receive and hold the rents, profits and income from said real property, subject to the orders and supervision of this court pending the final disposition of this cause, or, in the alternative, impounding in the hands of the defendant The First National Bank all moneys derived from said real property, or which might be derived therefrom during the pendency of this cause, and restraining and enjoining the defendant The First [14] National Bank from paying out or disbursing any of said money except as may be specifically ordered by the court or stipulated and consented to by the plaintiff.

(i) Declaring and decreeing the limitations on the power and disposition of said real property as contained in clause Sixth of said will to be invalid and of no force and effect.

(j) Declaring and decreeing that the direction for the accumulation of a sinking fund from the income of the property for the payment of the

mortgage, contained in said last will and testament of Lucy A. H. Deady is invalid and void under the rule as to perpetuities.

(k) Declaring and decreeing that paragraphs fifth, sixth, eighth, and ninth of said last will and testament are invalid and void.

(l) Ordering, directing and decreeing a full and complete discovery of the facts referred to herein and requiring defendants and each of them to render herein a true and correct accounting of all the moneys which they or either of them have received as income from the said Lot 1, Block 212, City of Portland, since the decease of Charlotte Howell Deady, being the 12th day of July, 1935.

(m) Awarding to this plaintiff judgment against the defendants and each of them for two-thirds of the income from said real property, since the said 12th day of July, 1936, less proper deductions for payment of indebtedness, taxes, legacies, expenses of administration and other costs which, after the accounting is had herein, may appear to the court to be just and proper charges to be deducted from plaintiff's share of said income.

(n) Awarding to the plaintiff his costs and [15] disbursements herein.

3. For such other and further relief as to the court may seem just and equitable.

JOHN SCOBLE

55 Liberty Street, New York

MAGUIRE, SHIELDS & MORRISON

Attorneys for Plaintiff [16]

EXHIBIT A

LAST WILL AND TESTAMENT

I, Henderson Brooke Deady, of the City of Portland, State of Oregon, being of sound and disposing mind and memory, do make, publish and declare the following to be my Last Will and Testament, hereby revoking all other and former wills by me at any time made.

First: I nominate and appoint Robert H. Strong of the City of Portland, State of Oregon, sole executor of this, my Last Will and Testament, and direct that no bond of any sort shall be required of him.

Second: I give, devise and bequeath unto my beloved wife, Charlotte Howell Deady, all my property, real and personal, of every name, nature and kind, wheresoever the same may be situated.

Third: Under Paragraph 8 of the Last Will and Testament of my beloved mother, Lucy A. H. Deady, executed the 29th day of July, 1920, I am authorized and permitted to bequeath by my Last Will and Testament to my wife, the income which would be derived by me, if living, from two-thirds of Lot 1, Block 212, City of Portland, State of Oregon, for and during the term of her natural life. I now, under and by virtue of said Paragraph 8 of my said beloved mother's will, bequeath said income from said two-thirds of Lot 1, Block 212, City of Portland, State of Oregon, to my beloved wife, Charlotte Howell Deady, for and during the term of her natural life, and nominate and consti-

tute her my appointee under said Paragraph 8 of the said will of Lucy A. H. Deady.

In witness whereof, I have hereunto set my hand and seal this 22d day of October, 1932.

HENDERSON BROOKE DEADY (Seal)

The above and foregoing was duly signed, sealed, published and declared by the said Henderson Brooke Deady to be his Last Will and Testament, in our presence, and we and each of us in his presence and in the presence of each other and at his request signed our names as witnesses thereto on the date therein named and the said Henderson Brooke Deady was at said time, in our opinion, of sound and disposing mind and memory and free from restraint of any sort.

Names

Addresses

RALPH C. DODD

New Milford, Conn.

JOHN S. ADDIS

New Milford, Conn.

[17]

EXHIBIT B

I, Charlotte Howell Deady, of New Milford, Connecticut, do hereby make, publish and declare this to be my Last Will and Testament, hereby revoking all other and former wills by me made.

First: I do hereby order and direct that all of my just debts and funeral expenses be paid out of my estate as soon after my decease as possible.

Second: I give, devise and bequeath unto my beloved husband, Dr. Henderson Brooke Deady, all my estate, real, personal and mixed, wheresoever situated, absolutely and forever.

Third: If my beloved husband, Dr. Henderson Brooke Deady, should predecease me, I give, devise and bequeath unto my son, Richard Howell Busck, also known as Richard Howell, my farm in New Milford, Connecticut, consisting of house, barn and approximately sixty acres (60) of land, and all the contents and furnishings of said house and machinery and apparatus and stock and poultry on said farm.

Fourth: In case my beloved husband, Dr. Henderson Brooke Deady, should predecease me, I further give, devise and bequeath unto my beloved son, Richard Howell Busck, also known as Richard Howell, all my other property, real, personal and mixed, wheresoever situated and of any kind or nature whatsoever, including all money which I may have in any bank or banks at the time of my decease, also all notes, bonds, and stocks, and bonds and mortgages owned by me at the time of my de-

cease, and all debts which may be owing to me at said time.

Fifth: I make no provision for my daughter, Karen Busck, in this, my Last Will and Testament, because she has arrived at her majority and has received her education and is self supporting.

Sixth: I nominate, constitute and appoint Dr. Henderson Brooke Deady to be executor of this, my Last Will and Testament; if my said beloved husband, Dr. Henderson Brooke Deady, should predecease me, I nominate, constitute and appoint my beloved son, Richard Howell Busck, also known as Richard Howell, to be executor of my Last Will and Testament, and direct that no bond or other security be required of either of them for the faithful performance of their duties.

In witness whereof I have hereunto set my hand and seal this fourth day of May, in the year One Thousand Nine Hundred and Thirty-three.

CHARLOTTE HOWELL DEADY (Seal)

Witnessed by:

JOHN M. SCOBLE

MARIVA INGLING

N. COURTENAY JOHNSTON

The foregoing instrument was subscribed, sealed, published and [18] declared by Charlotte Howell Deady, the testatrix above named, as and for her Last Will and Testament, in the presence of each of us, who, at her request, in her presence and in

the presence of each other, have hereunto subscribed our names as witnesses the day and year above written.

MARIVA INGLING

residing at 259 Edward St., Ridgewood, N. J.

K. COURTENAY JOHNSTON

residing at 461 West 22 Street, City of New York

JOHN M. SCOBLE

residing at 988 Lincoln Place, Brooklyn, N. Y.

[19]

EXHIBIT C

At a Court of Probate holden at New Milford,
within and for the District of New Milford, on
the 22nd day of July, 1935.

Present, John S. Addis, Judge.

Estate of Charlotte Howell Deady, late of New Milford, in said District, deceased.

This court finds that all parties known to be interested in said estate have signed and filed in this Court a written waiver of the notice of the hearing upon the application for the probating of an instrument purporting to be the last will and testament of said deceased, and said waiver is accepted and ordered to be recorded.

After hearing, this Court finds that the above named deceased was domiciled at the time of her death in the town of New Milford in said District,

that she died on the 12th day of July, 1935, leaving an instrument in writing purporting to be her last will and testament, that said instrument was duly executed by the said deceased as her last will and testament and that she was at the time of executing the same of lawful age and of sound mind and memory. It is therefore considered by this court that said will is duly proved and the same is approved, allowed and ordered to be recorded.

And Richard Howell, of New Milford, Conn., having been named in said will as Executor thereof, this court therefore appoints said Richard Howell as Executor of the last will and testament of said deceased, and said Richard Howell, on said day, appeared in court, accepted said trust, and gave a probate bond, with sufficient surety, in the sum of One Thousand (1,000) Dollars, which bond is approved, accepted and ordered to be recorded.

JOHN S. ADDIS

Judge. [20]

United States of America,
District of Oregon—ss.

I, Robert F. Maguire, first duly sworn on my oath depose and say that I am one of the attorneys for the plaintiff herein; that plaintiff is a citizen and resident of the State of Connecticut and is not within this jurisdiction at the time of the filing of this amended complaint; that I am possessed of information from which I have prepared the fore-

going amended bill of complaint; that the matters and things therein alleged are true of my own knowledge except as to those matters therein alleged on information and belief and as to them I verily believe them to be true.

ROBERT F. MAGUIRE

Subscribed and sworn to before me this 30th day of January, 1937.

[Seal]

HELEN HRUBY

Notary Public for Oregon.

My commission expires July 19, 1940.

[Endorsed]: Filed September 22, 1937. G. H. Marsh, Clerk, By F. L. Buck, Chief Deputy. [21]

. —————

And Afterwards, to wit, on the 12th day of October, 1937, there was duly Filed in said Court, a Motion to Dismiss Amended Complaint, in words and figures as follows, to wit: [22]

[Title of District Court and Cause.]

MOTION TO DISMISS AMENDED COMPLAINT

Come Now the defendants above-named and move the Court to dismiss plaintiff's Amended Complaint herein on the following grounds:

(1) Said Amended Complaint does not state facts sufficient to constitute a valid cause of suit or action against them.

(2) It appears upon the face of said Amended

Complaint that the suit has not been commenced within the time required by law.

SIMON, GEARIN, HUMPHREYS & FREED
EDGAR FREED

Attorneys for Defendants

I, Edgar Freed, one of the attorneys for the defendants, hereby certify that in my opinion this Motion is well founded in law. It is the contention of the defendants that it appears from the face of the Amended Complaint that the plaintiff has no interest in the property in question; and it is the further contention of the defendants that this proceeding is, in effect, a contest of the will of Lucy A. H. Deady, Deceased, and it appears from the face of said Amended Complaint that the suit was not brought within one year after the probate of said will, as required by Section 11-207, Oregon Code 1930; and it is the further contention of the defendants that, in any event, it appears upon the face of said Amended Complaint that this suit was not commenced within ten years after the alleged cause of suit accrued, as required by Sections 6-103 and 1-202, Oregon Code 1930.

EDGAR FREED [23]

State of Oregon,
County of Multnomah—ss.

Due service of the within Motion to Dismiss Amended Complaint is hereby accepted in Multnomah County, Oregon this 12th day of October,

1937 by receiving a copy thereof, duly certified to as such by Edgar Freed of Attorneys for Defendants.

MAGUIRE, SHIELDS & MORRISON
Attorneys for Plaintiff

[Endorsed]: Filed October 12, 1937. G. H. Marsh, Clerk. By F. L. Buck, Chief Deputy. [24]

And afterwards, to wit, on the 27th day of October, 1938, there was duly Filed in said Court, Objections to Application of the New Rules of Civil Procedure, in words and figures as follows, to wit:

[25]

[Title of District Court and Cause.]

OBJECTIONS TO APPLICATION OF THE NEW RULES OF CIVIL PROCEDURE

Come now the plaintiff and defendants and jointly object to the application of the new rules of civil procedure to the above entitled case on the grounds and for the reason that there is now pending before the court a motion to dismiss properly drawn and presented to it under the old rules and raising a determinative point in this case which should be decided by the court as presented under the old rules of federal procedure which were in effect at the time the motion was presented and argued to the court, plaintiff and defendants therefore request that the court make an order withholding the application of the new rules of civil procedure as pro-

mulgated by the Supreme Court of the United States for District Courts until determination of the motion to dismiss now before the court is made and apply to its determination the rules of federal procedure in existence prior to September 16, 1938.

ROBERT F. MAGUIRE

of attorneys for Plaintiff
Public Service Building
Portland, Oregon

EDGAR FREED

Of attorneys for defendants
Failing Building
Portland, Oregon

[Endorsed]: Filed October 27, 1938. G. H. Marsh, Clerk. By H. S. Kenyon, Deputy. [26]

And Afterwards, to wit, on Thursday, the 27th day of October, 1938, the same being the 99th Judicial day of the Regular July, 1938, Term of said Court; present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [27]

[Title of District Court and Cause.]

**ORDER SUSPENDING APPLICATION
OF NEW RULES OF PROCEDURE**

The objection of plaintiff and defendants to the application of the new rules of civil procedure for the district courts of the United States as promul-

gated by the Supreme Court of the United States coming on regularly to be heard, and it appearing therefrom that an issue which may be determinative of the case has been presented to the court under the former rules of procedure and that the determination of the same is now pending awaiting briefs of the respective parties and that the application of the new rules would not be feasible to the determination of said motion. It is, therefore

Ordered that the application of the new rules of civil procedure for the District Courts of the United States as promulgated by the Supreme Court of the United States shall be and is hereby suspended in this case until said motion to dismiss the same shall have been determined by this court.

Dated October 27th, 1938.

JAMES ALGER FEE

Judge

[Endorsed]: Filed October 27, 1938. G. H. Marsh, Clerk, By H. S. Kenyon, Deputy. [28]

And Afterwards, to wit, on Monday, the 6th day of November, 1939, the same being the 1st Judicial day of the Regular November, 1939, Term of said Court; present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [29]

[Title of District Court and Cause.]

ORDER DENYING MOTION TO DISMISS

The motion of defendants to dismiss plaintiff's amended complaint coming on regularly to be argued before the above entitled court, plaintiff appearing by Robert F. Maguire and Donald K. Grant of his attorneys, and defendants appearing by Edgar Freed and C. C. Carlson of their attorneys, said motion was argued to the court, the court taking the same under advisement and now being fully advised in the premises and having rendered its opinion herein and being of the opinion that said motion is not well taken, it is therefore

Ordered that defendants' motion to dismiss be, and the same is hereby, denied.

Dated this 6th day of November, 1939.

JAMES ALGER FEE

Judge

[Endorsed]: Filed November 6, 1939. G. H. Marsh, Clerk, by H. S. Kenyon, Deputy. [30]

And Afterwards, to wit, on the 1st day of December, 1939, there was duly Filed in said Court, an Opinion on Motion to Dismiss, in words and figures as follows, to wit: [31]

[Title of District Court and Cause.]

OPINION

November 6, 1939

James Alger Fee, District Judge:

A motion to dismiss was filed against a complaint filed by Richard Howell, as legatee of Charlotte Howell Deady, seeking an accounting against The First National Bank, by substitution a trustee, and Matthew Edward Deady and Hanover Deady as to certain income from real property devised under the will of Lucy A. H. Deady, deceased.

The will is set forth in the complaint and reads as follows:

“In the Name of God, Amen: I, Lucy A. H. Deady, of Portland, Oregon, widow of the later Matthew P. Deady, make this the following my Last Will and Testament, that is to say:

First: I will and direct that all my just debts and funeral expenses be paid.

Second: I request and direct that my body be interred by the side of my late husband, Matthew P. Deady, in **Riverview Cemetery**.

Third: Subject to the conditions, provisions and charges thereon hereinafter made, I give, devise and bequeath to my son Henderson Brooke Deady, the undivided two-thirds of Lot numbered One (1) in Block numbered Two Hundred and Twelve (212) of the City of Portland, Oregon. [32]

Fourth: Subject to like conditions, provi-

sions and charges thereon, I give, devise and bequeath to my two grandsons, Matthew Edward Deady and Hanover Deady, the remaining undivided one-third of said Lot 1, Block 212, Portland, Oregon.

Fifth: I direct that from the income derived from said Lot numbered 1 in Block numbered 212, there be paid to Mary E. Deady, widow of my deceased son, Edward Nesbith Deady, the sum of \$150.00 per month during the term of her natural life, and that there be paid to Marye Thompson Deady, who was the wife of my son Paul R. Deady, the sum of \$75.00 per month, so long as she survives and remains unmarried.

I further direct that the remainder of the income derived from the real property, shall be distributed as follows:

(a) To the payment to each of my grandsons,—Matthew Edward Deady and Hanover Deady, the sum of \$100.00 per month, and the remainder of said income shall be paid to my son, Henderson Brooke Deady. Such division of the income derived from the said real property to continue during the lifetime of my son, Henderson Brooke Deady.

Provided further, that from the income derived from said real property, and before the distribution of the same, there shall be paid therefrom, the inheritance tax properly chargeable against my estate, or the legacies or divi-

sions made, and after the payment of such inheritance tax, there shall be created a sinking fund of not less than \$1000.00 nor more than \$2500.00 per year, in discretion of my Executors, for the purpose of retiring and paying off the mortgage debt created and existing against said Lot numbered 1 Block numbered 212.

Sixth: I will and direct that said Lot numbered One (1) in Block numbered Two Hundred and Twelve (212), Portland, Oregon, shall neither be mortgaged, partitioned, sold, or otherwise encumbered by my devisees except for the improvement of the same, until the expiration of twenty-five (25) years from the date of my decease, and the devises to my said son Henderson Brooke Deady, and to my grandsons, Matthew Edward Deady and Hanover Deady, contained in items three and four hereof, are upon the express condition that said property shall not be disposed of or encumbered during the period aforesaid. Provided, however, that said real property may be encumbered by mortgage to renew the present mortgage, or such portion thereof as may from time to time remain unpaid.

Seventh: That in the event my son Henderson Brooke Deady die without issue, the undivided two-thirds of Lot numbered 1 in Block numbered 212, shall vest in my grandsons hereinbefore named, and I give and devise the same to my said grandsons. [33]

Eighth: I authorize and permit my son Henderson Brooke Deady, if he so elects to do, to bequeath by last Will and Testament to his wife, (if he then has a wife,) the income that would have been derived by him if living, from the two-thirds of Lot 1 Block 212, City of Portland. Such bequest to continue only during the life time of the widow of said Henderson Brooke Deady.

Ninth: The monthly payments directed to be made to my grandsons, and the residue of income directed to be paid to my son Henderson Brooke Deady, provided for in Item Fifth of this Will, shall continue for a period of ten years after my death, and thereupon and thereafter the net income derived from said Lot 1 in Block 212 of the City of Portland, shall follow the title and ownership of said real property, and shall be distributed, two-thirds to my son Henderson Brooke Deady, and the remaining one-Third to my two grandsons, subject to the payment of the legacies bequeathed to Mary E. Deady and Marye Thompson Deady, in said Fifth item specified. It is my wish that my executors provide out of the residue of the income bequeathed to my son, Henderson Brooke Deady, in Item Fifth, funds at their discretion, to further any legitimate or worthy ambition or aim, other than business ventures, which my grandsons Matthew Paul and Hanover or either of them, may undertake or entertain.

Tenth: I give, devise and bequeath to my son Henderson Brooke Deady, that certain parcel of real estate situated and being in Mountain View Park heretofore conveyed to me by my son Edward Nesmith Deady.

Eleventh: I give and bequeath to my grandson Hanover Deady my law library.

Twelfth: All the rest, residue and remainder of the property of which I shall be seized, of whatever nature and wheresoever situated, I give, devise and bequeath to my son Henderson Brooke Deady and to my grandsons Matthew Edward Deady and Hanover Deady; to Henderson Brooke Deady the undivided two-thirds thereof, and to Matthew Brooke Edward Deady the undivided one-sixth thereof, and to Hanover Deady the remaining undivided one-sixth thereof.

Lastly: I hereby nominate and appoint my son Henderson Brooke Deady, and my friend Joseph Simon, of Portland, Oregon, to be the Executors of this my last Will and Testament, and also Trustees to manage my estate, and I direct that no bond or security shall be required of them as such Executors or Trustees. I also direct that in the event of the death, resignation or disqualification of all of my said Executors, and Trustees herein named, the Security Savings and Trust Company, of Portland, Oregon, shall then complete the execution of said Estate, and serve as Trustee thereof.

I hereby revoke all former Wills by me at any time made. [34]

In Witness Whereof, I have hereunto set my hand and seal this the 29th., day of July, A. D. 1920, at Portland, Oregon.

(Signed) Lucy A. H. Deady (Seal)

The above instrument of writing was signed by Lucy A. H. Deady, the Testatrix therein named, in the presence of us, who at her request and in her presence, and in the presence of each other, have subscribed our names as witnesses thereto.

(Signed) Chester V. Dolph
Residing at Portland, Or.

(Signed) J. V. Beach
Residing at Portland, Or.”

The complaint sets out certain salient facts which are outlined below. Lucy A. H. Deady made this will in 1920, at which time she was owner in fee simple of the real property in question. She died August 29, 1923. Henderson Brooke Deady married Charlotte Howell Deady and died without issue May 28, 1933. His wife died July 12, 1935. Plaintiff is her son and heir. The estate of Lucy A. H. Deady was closed March 6, 1936. The Bank has been acting as sole trustee by substitution after the death of the two trustees named in the will.

In the construction of a will dealing with realty situate in Oregon, the federal court must follow

rules of property established by the highest court of that state.¹ If the Supreme Court of Oregon have not spoken, then the federal court must, in the determination of the instant case, follow the principles which the state court would have applied if the cause had been presented there.² Great weight has been given in all opinions [35] by the Supreme Court of Oregon to the statutory rule that the polestar of interpretation of a will is the intention of the testator.³ The various canons of construction applied at common law or in other jurisdictions have, on that account, been less rigidly followed in this state, despite the theory that canons furnish a formalistic guide to the intention of the testator where it is not clear from the context. For although the language of a testament is usually not that of the testator, but rather that of a technical draughtsman which may not reflect the actual intent of the maker, all the context of the document is considered⁴ by that court to find the intention reflected by the artificial language.⁵ The canons are often dis-

1. *Clarke vs. Clarke*, 178 U. S. 186. 191; *Barber vs. Pittsburg, Fort Wayne & Chicago Railway Co.*, 166 U. S. 83.

2. *Erie Railway Co. vs. Tompkins*, 304 U. S. 64.

3. *Oregon Code* 1930, Sec. 10-531; *Stubbs vs. Abel*, 114 *Oregon*, 610, 619; *Love vs. Walker*, 59 *Oregon*, 95, 107; *Bilyeu vs. Crouch*, 96 *Oregon* 66, 69.

4. *Bilyeu vs. Crouch*, *supra*, 69; *Gildersleeve vs. Lee*, 100 *Oregon*, 578; *Fields vs. Fields*, 139 *Oregon*, 41; *Rose City vs. Langloe*, 141 *Oregon*, 242, 244;

5. See *Stubbs vs. Abel*, *supra*.

cussed, but generally an attempt is made in each instance to discover from indicia the actual intention of the maker.

The intention of the testatrix in the will at bar is not clear, except in certain features. She unquestionably intended to control her property for a long period of time after her death. However, she also intended to give specific items of the property to her sons and grandsons, subject to this control.

The third subdivision of the will Mrs. Deady gave two-thirds of Lot No. 1 to Henderson Brooke Deady. By the fourth paragraph she gave the remaining one-third of Lot 1 to Matthew Edward Deady and Hanover Deady. The gift to Henderson Brooke Deady is "subject to the conditions, provisions and charges thereon hereinafter made", and that to Matthew Edward Deady and Hanover Deady is "subject to like conditions, provisions and charges thereon". The words of gift in each of these two [36]

separate devises are couched in similar language and should be given like effect as to the time of the investment of the respective devisees with title and as to the character of the interest given. It must be concluded as to each parcel the testatrix was intending to convey a fee title," and that the language conveying this intention is direct and posi-

6. "Heirs" or other words of inheritance are not necessary to convey an estate in fee simple. Oregon Code 1930, Sec. 63-105; See *Palmateer vs. Reid*, 121 Oregon, 179, 184, 185.

tive. The fee in each instance was subject to the stipulations expressly mentioned which now must be discussed.

In Oregon, by interpretation of a statute,⁷ reinforced by the common law rule, where an estate in fee is given in one clause of a will in clear and explicit terms the interest which the devisee thus obtains cannot be taken away or diminished by any subsequent vague or general expression of doubtful import or by any inference deducible therefrom that may be repugnant to the estate given.⁸ It must then be concluded that the "conditions, provisions and charges" were mentioned, not for the purpose of diminishing the fee title expressly given in either instance, but for the purpose of subjecting that title to the "charges" contained in the fifth subdivision, to the "provision" also contained in that item for the creation of a sinking fund to pay a mortgage on the real estate, and to the "condition" contained in the sixth subdivision to the effect that "the devises to my said son Henderson Brooke Deady and to my grandsons Matthew Edward Deady and Hanover Deady contained in items three and four thereof are upon the express condition that said property [37] shall not be disposed of or encumbered during the period" of twenty-five years.

7. Oregon Code 1930, Sec. 10-528; *Imbrie vs. Hartrampf*, 100 Oregon, 589, 595; *Irvine vs. Irvine*, 69 Oregon, 187, 190.

8. *Friswold vs. United States National Bank of La Grande*, 122 Oregon, 246, 251.

Nothing is said about other disposition of the title on any contingency whatsoever.⁹ If there had been, the fee given to the grandsons would not have been subjected to a like limitation because their title was absolute. These clauses have no reference whatever to the seventh paragraph which carries a further disposition relating to the portion given to Henderson Brooke Deady alone. The inference to be drawn from the language so far considered is that a fee simple absolute was given to each parcel at the time of the death of Mrs. Deady, subject only to these stipulations so specifically mentioned.

The contest here arises because of this seventh item of the will, which is imbedded among a series of provisions relating to the disposition of the income from the real property and not to the title and at a point where one might expect a clause dealing with the disposition of the income upon the death of her son. This clause reads as follows:

“That in the event my son Henderson Brooke Deady die without issue the undivided two-thirds of Lot numbered 1 in Block numbered 212, shall vest in my grandsons hereinbefore named, and I give and devise the same to my said grandsons.”

9. See *Stubbs vs. Abel*, *supra*, 633. The clause was “subject to such disposition as I may hereinafter make of any portion thereof.” If the reference to the provisions of the seventh paragraph of the will were direct and positive, the rule as to cutting down the fee would be weakened in application.

If this provision had been clear and direct and made the fee given to Henderson Brooke Deady determinable on some event in the future, full effect would have been given to it, notwithstanding the language of clause three.¹⁰ The draughtsman could have easily framed the wording so as to remove all doubt. As the will reads now, however, the construction is doubtful [38] in three respects, (1) whether the fee was to be cut down, (2) when the devise over was to take effect, (3) whether definite or indefinite failure of issue was meant.

The first question as to whether the fee was to be cut down is cardinal. The indications from the first paragraphs are strongly that it should not be and that the son was vested with fee simple title, as has been noted.

The position of this clause and the language thereof do not make a contrary intent clear, but serve only to introduce confusion. Controversies innumerable have been waged over the words "die without issue". The construction thereof has changed according to time, the jurisdiction, the statutory background and public policy during the last one hundred fifty years. The task devolves upon this court, then, of fixing a date of distribution as to this particular interest in the real property and of determining whether an executory devise based upon that date of distribution can be

10. See *Imbrie vs. Hartrampf*, *supra*, 598, 601; *Stubbs vs. Abel*, *supra*, 631-2. *Rowland vs. Warren*, 10 Oregon, 129, 131.

carried out in view of the public policy of the state of Oregon. In this phrase there are the second and third potential foundations for controversy, the effective time of death and the meaning of "issue".

As to the effective time of death, it is possible that a testator may have meant the gift over to take effect on "death at any time" of the first donee. Again, the maker of the will may have so designated an "intermediate date" that the gift over would take effect, if at all, dependent upon an event which might happen after the death of the maker, but not necessarily after the death of the primary donee. Finally, the testator may have meant that the devise should take effect, as a "substitutional" gift, upon the happening of an event before his own death or not at all.

As to the third potential controversy, the Oregon Supreme Court has apparently adopted the rule that an executory devise [39] based upon indefinite failure of issue is void.¹¹ If, then, that court would construe the words "died without issue" to mean a limitation based upon an "indefinite failure of issue" as do many American courts, where no statute controls, the gift over to the grandsons would be avoided.

A gift to "issue" is usually construed to include all of the lineal descendants of the ancestor. Death without issue at common law was construed to mean an "indefinite failure to issue" until the rule was changed by statute of England in 1837. The common

11. *Imbrie vs. Hartrampf*, *supra*, 599.

law rule was followed generally in the United States up until about 1850, when statutes construing these words, to import "definite failure of issue", were adopted in many states, and in some states the same result was reached by judicial construction.¹³ In a few jurisdictions where there is no statute, the common law rule is still adhered to,¹⁴ although violent criticism of the doctrine and its introduction on American soil has been made.¹⁵ In some states, of which Oregon is one, a grant of a fee tail is construed as a fee simple.

An executory devise based upon an "indefinite failure" is, generally speaking, void. To escape this common law construction of these words as importing "indefinite failure of issue", many American courts adopted the device of construing "die without issue" to mean the death of the primary donee in the life of the testator and the gift over as "substitutional" in character. [40] Therefore, if the first taker outlived the testator, he took in fee.

These shifting principles and the application thereof in Oregon, with great emphasis upon the

12. Warren, "Gifts Over On Death Without Issue", 39 Yale Law Journal, 332.

13. Moore vs. Moore, 51 Kentucky, 651.

14. Huxford vs. Milligan, 50 Indiana, 542; Mercantile Trust Co. vs. Adams, 95 Arkansas, 333; Mc Carthy vs. Walsh, 123 Maine, 157.

15. "The Abolition of Estates Tail", 21 Virginia Law Review, 286; Warren, "Gifts Over On Death Without Issue", supra, 342; "Definite and Indefinite Failure of Issue", 6 Columbia Law Review, 175, 182.

intention of the testator if it can be otherwise discovered, lay the foundation for construction. Without decision that this phrase imports an "indefinite failure of issue" in this jurisdiction, attention will be directed to the second point and an effort made to solve the problem of date of distribution with reference to the death of Henderson Brooke Deady.

There are many jurisdictions of the United States where the seventh clause of the will would be construed to mean that the fee title vested in Henderson Brooke Deady would pass on his death, whenever that occurred, to the grandsons, if no other intention were expressed as to this by the will.¹⁶ In Oregon, no canon of construction is closely followed and there is no clear expression that such rule ever would be applied. An attempt would be made to discover the intent from the context. The Oregon decisions can not be reconciled on any other basis. In *Rowland vs. Warren*, *supra*, the court held a purchaser from a devisee who died leaving children, under a will which provided for an executory devise over, if she died without children, took a fee simple title. In *Bilyeu vs. Crouch*, *supra*, there was a life estate to A, remainder to B and the heirs male of his body, in default of male children to the daughters of the testator, and in default of issue to the sisters of B. The court disregards the fact that what is dealt with is a remainder after a life estate,

16. *Britton vs. Thornton*, 112 U. S. 526, 533; *Boshell vs. Boshell*, 218 Alabama, 320; *Briggs vs. Hopkins*, 103 Ohio State, 321.

and holds the [41] intention of the testator was to give the fee to the sisters in case of death of B without children. Although the present question is discussed it is clear the facts were not such as called for application of any principles involved here,¹⁷ since there was a precedent life estate, and the court determines from the complicated language of the limitation that B was to take the fee if and only if he had heirs of his body.

Imbrie vs. Hartrampf, *supra*, is very similar in its facts and the provisions of the will to the case at bar. There a gift of a fee to Ralph was followed by a restriction on alienation until the devisee arrived at forty years of age, coupled with an executory devise on breach of condition. There were devises of fee title to other lands to others and a residuary devise. In a separate paragraph there is a provision that if any devisee "die without leaving lineal descendants, children or grandchildren" then his share should be equally divided. The testator died in 1897. In 1920, after Ralph had attained the age of forty without violating the restriction against alienation, the court held he could convey fee simple title.

The devise is "in full of any indebtedness" from testator to Ralph. This is probably evidentiary of

17. *Buchanan vs. Schulderman*, 11 Oregon, 150 and *Love vs. Walker*, *supra*, each dealt with a remainder over after a life estate, and in each instance the court attempted to discover actual intention of the testator from the context.

an intention to convey the fee. But no distinction between the case there and that at bar can be drawn, because the intent to give the fee is as clearly indicated here. The court found against the "death at any time" rule upon a situation quite comparable to that at bar. In so doing, the court quoted from *Britton vs. Thornton*, *supra*, apparently [42] with the idea that since the condition against alienation had expired the excerpt was applicable and supported the "intermediate date" of expiration which had been fulfilled. The court had theretofore expressed a decided preference for the "substitutional rule" and had indicated that it should be applied to the situation. The meat of the decision is that such a situation indicates a testamentary intent to give a fee simple absolute and repudiates the "death at any time" doctrine as applied to such facts. The concurring opinion finds the intent to give absolute title but avoids the executory devise for a violation of the rule against perpetuities. Great weight is here laid on the fact that the possible intermediate date had been fulfilled.

The present will contains less context to indicate that death of *Henderson Brooke Deady* "at any time" was fixed in the mind of the testatrix as the date of investment of complete title than does *Imbrie vs. Hartrampf*, *supra*. If *Henderson Brooke Deady* had outlived the period of twenty-five years from the death of the testatrix and all the other "conditions, provisions and charges" had been fulfilled, then the case would fit exactly into the situa-

tion in the Imbrie case. The Oregon court then would have held that he took a fee and it would not be necessary to determine what the effective date should be, whether in accordance with the "substitutional" or "intermediate date" doctrine.

In this connection, as to the fees granted respectively to the son and grandsons, the restriction on alienation for a period of twenty-five years seems to imply a complete control in the respective devisees after that period, at least. So far at least, the cases are similar.

The fees given to the son on the one hand and the grandsons on the other should be regarded together in order [43] to fix the point of complete investment. Neither should be cut down by construction. Each fee is subject to the same "conditions, provisions and charges". Henderson Brooke Deady's death is mentioned only once in connection with the devolution of the fee and that instance is in the disputed clause seven, itself.

In the clauses relating to the income, it is set forth in item five that a certain distribution is to be made "during the lifetime of my son Henderson Brooke Deady", but this is contradicted by the later limitation of that particular distribution to ten years, and the provision that Henderson Brooke Deady could by will continue the same part of the income to his widow. This carried on the distribution for a period beyond the death of Henderson Brooke Deady and beyond the twenty-five years.

It is to be noted that it is claimed that the will of Henderson Brooke Deady, whereby he transferred his interest in the income to his widow for life, was a construction of the will by him. But the portion which he bequeathed under this power was only the income. Apparently, he acquiesced in the twenty-five year restriction on alienation and believed his widow would receive the income only if he bequeathed it to her. It is certain he accepted the restriction on alienation during his lifetime, but that acceptance would not validate the restriction as matter of law. It seems clear the testatrix intended to recognize the devolution of this portion of the income, whether by incorporation by reference before her death or as a strict exercise of power after her death. Whether valid or not is a different question. Unquestionably, she intended the income to be distributed for twenty-five years, wherever the fee reposed. [44]

The fee given to the grandsons was to be enjoyed by them upon terms which had no relation to the death of Henderson Brooke Deady. This is a convincing argument toward the conclusion that the fee given to Henderson Brooke Deady was upon the same terms. The full enjoyment of the fees respectively relate only to the "conditions, provisions and charges" and are expressly conditioned upon the twenty-five year period.

Mrs. Deady contemplated the death of her son during this period, because in the clause appointing

the trustees she made provision for the carrying on of the trust after his death, although he was appointed as a trustee. Again this clearly points to the twenty-five year period which is the outstanding feature of the will.

In arriving at the conclusion that the death of Henderson Brooke Deady "at any time" was not contemplated by the testatrix as the period of distribution of the property allocated to him, the proposition is foreshadowed that there may have been some other date after her own death when she desired the son to come into full enjoyment, or an executory devise to take effect.

Where a gift of a fee with an executory devise over upon death of the first taker without children is postponed by an estate for life¹⁸ or for years,¹⁹ or by any other provisions which prevents the gift from having full effect,²⁰ the full enjoyment of the fee or the taking effect of the executory [45] devise

18. *Flores vs. DeGarza*, 44 Southwestern (2d), 909, Tex. Comm. App. 1932; *Matter of Farmer's Loan & Trust Co.*, 189 New York, 202; *Scanlin vs. Peterson*, 105 Connecticut, 308; *Booth vs. Eberly*, 124 Maryland, 22.

19. *Ensminger vs. Grimes*, 201 Kentucky, 494.

20. *In re Vizelich's Estate*, 12 Pacific (2d), 992, rehearing 18 Pacific (2d), 773 (Cal. App.); *Howard vs. Howard's Trustee*, 212 Kentucky, 847; *Gertig vs. Wells*, 100 Maryland, 93; *Boynton vs. Boynton*, 266 Massachusetts, 454; *Patterson vs. Madden*, 54 New Jersey Equity, 714; *Van Tilburg vs. Martin*, 120 Ohio State, 26.

is dependent upon this date, according to the decisions of many jurisdictions.

This doctrine is a corollary of the principle widely accepted that an "intermediate date" between the death of the testator and the death of the fee donee without children at any time will be selected, unless the will indicates a contrary intention. This later proposition steers between Scylla and Charybdis. It does not prevent the person to whom the fee was given from enjoying it during his lifetime. On the other hand, it avoids the "substitutional" rule which is criticised because of the fact that this interpretation was historically adopted for the purpose of avoiding the "indefinite failure of issue" construction. All in all, the wishes of most testators are best interpreted by choosing an "intermediate date".²¹

21. In *Britton vs. Thornton*, supra, it is said:

"When indeed a devise is made to one person in fee, and 'in case of his death', to another in fee, the absurdity of speaking of the one event which is sure to occur to all living as uncertain and contingent has led the courts to interpret the devise over as referring only to death in the testator's lifetime. * * * But when the death of the first taker is coupled with other circumstances which may or may not ever take place, as, for instance, death under age or without children, the devise over, unless controlled by other provisions of the will, takes effect, according to the ordinary and literal meaning of the words, upon death, under the circumstances indicated, at any time, whether before or after the death of the testator."

The Oregon Supreme Court has quoted this case but has not followed it, since the decisions have

Oregon has not squarely accepted either phase of this rule but it is probable that the tendency would be to follow the results, which would be obtained by the application of either.

In *Shadden vs. Hembree*, 17 Oregon, 14, the court found that the testator gave a fee to his son Henry L. Hembree subject to the control of the widow over the property until [46] her remarriage or her death, but if both the widow and the son died before the son became twenty-one years of age, then to a nephew Frank M. Shadden. The testator died in 1876. The nephew died in 1879. The widow died in 1880, without remarriage. The son died in 1884 before he arrived at the age of twenty-one. The writer of the opinion adopted by the court says: "If I am correct in the view that Lycurgus Hembree (the testator) intended that the property in question should go to Frank M. Shadden only in the event that Henry L. Hembree died during the life of his mother, and that Shadden should be living at the time of the occurrence, then the contingency upon which the limitation over was made to depend never happened; * * *". The court picks this intention out of the will. But the court held that the son took a fee on the mother's death. In other words, when his enjoyment of the property

been controlled by the intention of the testator. See *Bilyeu vs. Crouch*, *supra*; *Love vs. Walker*, *supra*; *Kaser vs. Kaser*, 68 Oregon, 153; *Rowland vs. Warren*, *supra*, *Imbrie vs. Hartrampf*, *supra*.

was complete, he took the fee, and the executory devise failed even though he did not live to be twenty-one. Although the court goes roundabout to arrive at this conclusion, there is little doubt that the correct date of distribution was chosen. This case furnishes a clear precedent against the existence of the "death at any time" rule in this state, where the testator has not expressly set out such an intention.

The dissenting opinion in *Love vs. Walker*, *supra*, construes the will as creating a trust which was to be fulfilled within ten years after the testator's death, and as creating a fee simple determinable at that date "without lawful issue born alive and living at the time of his death". But the majority as above noted held that the codicil reduced the estate to one for life, so that this doctrine was not adopted by the court.

In the will under construction, however, a fee to Henderson Brooke Deady is given subject to certain "conditions, provisions and charges". Unless, therefore, a clearly valid "intermediate date", consistent with these limitations can be [47] found, no devise over should be given effect, but the primary grant should be absolute. The fees were given to the son and the grandsons, respectively, upon express condition against alienation for twenty-five years. If the title so passed to the sons and the grandsons, respectively, at the death of Lucy Deady, then this fetter could be stricken off by the

holder of the title.²² A restriction on alienation has nothing necessarily to do with the rule against perpetuities. However, the courts apply the same limitations to such a provision if extended over what is considered an unreasonable period of time.²³ While, therefore, the mere restriction upon alienation would not affect the title, a period for taking effect of an executory devise would be limited under the rule against perpetuities.²²

The Supreme Court of Oregon has held that where a restriction on alienation is imposed upon a fee title, during the entire life of the first taker, an executory devise dependent upon breach of this condition subsequent is void.²⁴ In the will here under consideration the restriction was for a period of twenty-five years by express condition subsequent. The devise over does not take effect upon breach of the restriction, but upon death without issue. However, the express condition against alienation and the limitation over on death without issue are mutually interdependent. The [48] context makes it improbable that Lucy A. H. Deady intended to deprive Henderson Brooke Deady of the

22. *Closset vs. Burtchaell*, 112 Oregon, 585.

23. *Gray, Perpetuities*, Sec. 118a; *Pulitzer vs. Livingston*, 89 Maine, 359, 363; *Colonial Trust Co. vs. Brown*, 105 Connecticut, 261, 279.

24. *Friswold vs. United States National Bank of LaGrande*, *supra*. The position is foreshadowed by the dissenting opinion in *Imbrie vs. Hartrampf*, *supra*.

full enjoyment of the fee during his life, although she desired to keep control for a long period. If he had outlived the *twenty-five period* of restriction and come into full enjoyment, he would have taken the fee title, as above noted. If he died prior to that date, the restriction against alienation would have fettered him during his entire life, and in any event might have denied him freedom of action for a period beyond which a restriction on alienation would be upheld. Since Henderson Brooke Deady took a fee upon the death of the testatrix, restricted by the express condition against alienation, which is void, an executory devise dependent either upon his death without issue during the time when this condition fettered enjoyment or after the expiration of the unreasonable period of twenty-five years would be void.

If, then, a strict application of the rule against perpetuities were made or the rule against unreasonable restriction on alienation affecting the devolution of title, the executory devise of this will is of no validity. The rule against perpetuities deals only with the vesting of estates and not with the enjoyment thereof. But an executory devise which may possibly not vest for a period over twenty-one years is void. This executory devise does not depend on lives in being but upon an arbitrary twenty-five year period. The time so limited, plus the express condition subsequent as to alienation for the period, prevent the devises over to the grandsons from taking effect.

The Court, however, does not necessarily hold that the [49] executory devise to the nephew are invalid upon these principles. The search was prosecuted for a valid "intermediate date" after the death of the testatrix without going to the extreme of holding the death of Henderson Brooke Deady "at any time" satisfied the intention.

As noted above, the most probable date of full enjoyment of the fees given respectively to the sons and grandsons was the end of the twenty-five year period during which Mrs. Deady did not desire this Lot One sold or mortgaged. The full enjoyment was circumscribed by "express condition" to that effect as to each parcel thereof.

No other "intermediate date" is possible. The death of Henderson Brooke Deady is not contemplated as the date of taking effect of the executory devise as has already been shown. Even if the lives of all those who had legacies charged against this parcel outlasted the twenty-five years, they might each have died and so the rule would still take effect. But a reading of the document convinces the court that the twenty-five year date was controlling of all other factors. The period of ten years is unquestionably so controlled and simply provides for a different distribution of the income.

The question of whether there was a valid trust arises here, but does not affect the solution.²⁵ If title in fee was given to the trustees, the trust did not

25. Closset vs. Burtchaell, *supra*.

end with the death of Henderson Brooke Deady, because there is a provision for continuance by the Bank afterward. The same difficulties as to the period of distribution by the trustees arise. Here the twenty-five year period still is controlling. An executory [50] devise dependent upon the fee given to trustees for twenty-five years would be invalid. If these trustees took an estate for years, the result would be the same, because an executory devise could not take effect thereafter.²⁶ The court construes the will, however, as providing trustees to manage the estate, build up a trust fund and to pay out the income in accordance with the directions thereof for a period of at least twenty-five years.

If this conclusion is correct, the limitation upon the income had no effect upon the devolution of the title. The clause of restraint on alienation considered as such is not effective as against the son and grandsons, as holders of the fees of the different parcels. But there is, then, no criterion as to an "intermediate date" for taking effect of the executory devise, except the time when the respective devisees would have come into full enjoyment under the express condition.

The twenty-five year period, then, is the salient factor of the will. The court thus arrives at the conclusion that no valid "intermediate date" can be chosen which will give validity to the executory

26. See *In re Johnston*, 185 Pennsylvania, 139.

devise. The fee was given. A like fee was given the grandsons. The "conditions, provisions and charges" do not affect the passing of title. The fee should not be cut down, except by a clear expression. There is no clear expression as to an intermediate time for the taking effect of the executory devise. Whether this time be chosen as the time when distribution of the particular property was to be made, or the time when the trustees were to go out of control or when the son and grandsons were to [51] receive the full enjoyment of the respective fees, the result is the same, the executory devise would be invalid. If this, then, were the expressed intention of the testatrix, effect could not be given to it, since the intent offends a rule of public policy.²⁷

The rule, formerly supported by the heavy weight of authority and still by respectable modern decisions²⁸ in the United States, affords a method of carrying out the main intention of the testatrix. Such decisions rule that where a fee is given to be determined upon "death without issue", that in the absence of an expression of a contrary intention in the will, if the original donee outlive the testator he takes in fee simple absolute; if he "die without issue" during the lifetime of the testator, the gift over takes effect by way of substitution, but not by executory devise.

27. *Closset vs. Burtchaell*, *supra*, 601.

28. *In re Gulstine's Estate*, 166 Washington, 325; *Will of Caldwell*, 205 Wisconsin, 587; *Hull vs. Hull*, 101 Connecticut, 481.

The existence of this doctrine in Oregon has been denied by implication²⁹ and by implication affirmed³⁰ by the Supreme Court of the State. But the intention in this particular will to give the fee is clear. Henderson Brooke Deady was obviously the favorite son. Another portion of the property is given him in fee simple. He is named as the principal legatee. He is one of the residuary legatees. He is chief devisee of the income. He is a trustee under the will. The creation of the trust to pay off the mortgage was an attempt to assure Henderson Brooke Deady of an estate clear of indebtedness at the end of a period of time which [52] the law holds unreasonable. But it gives no indication that he was not to have fee title.

The Oregon court have not construed the words "die without issue" to import "indefinite failure of issues", and the probabilities are will never do so. Since the state was not created until 1859 and the older constructions were then passing away, it would seem anomalous in a jurisdiction where entailed estate have never been recognized to do so. But the judges of the common law so held,³¹ and earlier there might have been a tendency to follow the majority of American precedent. The tendency

29. *Bilyeu vs. Crouch*, *supra*; *Rowland vs. Warren*, *supra*.

30. *Imbrie vs. Hartrampf*, *supra*.

31. *Oregon Laws*, 1843, page 100; *Oregon Constitution*, Article XVIII, Sec. 7; *Rowland vs. Warren*, *supra*, 129; *Barber vs. Pittsburg, Fort Wayne & Chicago Railway Company*, *supra*, 83.

of the court at present, would be to examine the context of the will and seek a guide to the meaning of the testatrix. If the search for a definite expression failed or the express desire might be against public policy, the court would avoid the consequences of a holding that these words imported "indefinite failure of issue" by use of the "substitutional rule" where, as here, the intent to give a fee to the first taker is clearly expressed. The cardinal factor of the intention of the testatrix would thus be carried out. The preference for early vesting of estates delineated by the decisions of the Oregon court would have its effect. The rule against cutting down a fee given in an early clause of a will has compelling influence and would be thus carried out. If the court looked at the clause as an attempt to create a fee tail in Henderson Brooke Deady the construction would be the same.³² [53]

Argument is made that the words "subject to" in the third clause prevent this construction, but the court has already noted that the seventh item was not thereby referred to. It is also said that the word "vest" in the seventh item refers to a time after the death of the testatrix, but inasmuch as this word is used in connection with the phrase "I give and devise", it seems more reasonable, all other things being equal, to refer them to the date of the death of Mrs. Deady.³³

32. Fee tail abolished in Oregon, Sec. 63-105, Oregon Code 1930.

33. See *Fowler vs. Duhme*, 143 Indiana, 248.

The will of the testatrix can be carried out by the application of this doctrine. She intended Henderson Brooke Deady to have a fee. She intended this fee to be subject to the "conditions, provisions and charges" set out. If this construction is carried out the fee will still be subject to these, so far as valid. She intended to control her property far into the future. Therefore, a sale either during a period of twenty-five years by her sons or her grandsons would be contrary to her intention. But this desire to hold the property intact cannot be carried out fully. The construction carries out the will of the testatrix as far as possible.

The suit is brought in time, as the point of attack is not the construction of the will or the recovery of the property, but an accounting for the income to which plaintiff claims to have been entitled since the death of his mother.

The motion to dismiss is overruled.

[Endorsed]: Filed December 1, 1939. G. H. Marsh, Clerk, By F. L. Buck, Chief Deputy. [54]

And afterwards, to wit, on the 31st day of January, 1940, there was duly filed in said Court, an Answer to Amended Complaint in words and figures as follows, to wit: [55]

[Title of District Court and Cause.]

ANSWER

The defendants answer the amended complaint herein as follows:

First Defense

The amended complaint fails to state a claim against the defendants, or any of them, upon which relief can be granted, in that it fails to show that the plaintiff has any interest in the property in question.

Second Defense

The amended complaint contests the validity of the will of Lucy A. H. Deady, and said will was admitted to probate more than one year prior to the commencement of this suit.

Third Defense

Any right of action set forth in the amended complaint did not accrue within the ten years next preceding the commencement of this suit.

Fourth Defense

I.

Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph I of the amended complaint.

II.

Admit the allegations contained in Paragraphs II, III, and IV. [56]

III.

Answering Paragraph V, admit that on August 29, 1923, Lucy A. H. Deady was seized in fee of the real property described in said paragraph; that she died on said date leaving the last will and testament of which a substantial copy is set out in said paragraph; that said will was duly and regularly proved and admitted to probate in the Circuit Court of the State of Oregon for Multnomah County on the 5th day of September, 1923, and Letters Testamentary were issued on the 15th day of September, 1923, to Joseph Simon and Henderson Brooke Deady as executors thereof, and administration of the estate was had thereunder; that said estate was closed on the 6th day of March, 1936, and The First National Bank of Portland, then the Executor thereof, was discharged; that the real property described in said paragraph constituted the major portion of said Lucy A. H. Deady's estate, and at the time of her death was profitably leased for a long period of years and was yielding substantial revenue; and that said lease is, in a modified form, still in existence and has a number of years to run. Except as herein admitted, defendants deny the allegations contained in said paragraph.

IV.

Admit the allegations contained in Paragraph VI, except as to the date of the Letters Testamentary, which date is 1933 instead of 1923.

V.

Answering Paragraph VII, admit that Charlotte Howell Deady died on or about the 12th day of July, 1935. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in said paragraph.

VI.

Answering Paragraph VIII, admit that there is a controversy between the plaintiff and the defendants herein involving, in part, the construction and legal interpretation of the will of Lucy A. H. Deady; that the plaintiff makes, among others, the claims and contentions set out in Subparagraphs (a), (b), (c), and (d); that the defendants contend that under the will of Lucy A. H. Deady there was devised to Henderson Brooke Deady a defeasible fee estate in Lot 1, [57] Block 212, City of Portland, Oregon, subject to be defeated upon his death without issue, and a power of appointment to be exercised by him in favor of his wife as provided in the Eighth Item of said will, and that upon the death of Henderson Brooke Deady without issue his said estate in said Lot 1, Block 212, was defeated and his widow, Charlotte Howell Deady, received only the interest created by his exercise of the power of

appointment, and did not receive an estate of inheritance in said property. Except as herein admitted, defendants deny the allegations contained in said paragraph.

VII.

Answering Paragraph IX, admit that Joseph Simon, surviving executor and trustee of the estate of Lucy A. H. Deady, died on the 14th day of February, 1935 (erroneously stated in the amended complaint to be 1934), and the defendant First National Bank was, on the 27th day of February, 1935 (erroneously stated in the amended complaint to be 1934), appointed and qualified as executor thereof, and continued as such until the 6th day of March, 1936, when the estate of Lucy A. H. Deady was closed and said bank discharged as executor; that said bank ever since has managed and controlled said Lot 1, Block 212, and collected, received, and disbursed the income therefrom as trustee of said estate; that the plaintiff does not know the amount of money received by said bank from said property since the 6th day of March, 1936, and the disposition thereof; that a portion of said income has been, and is being, paid to the defendants Matthew Edward Deady and Hanover Deady by said bank; that plaintiff has made a demand upon each of the defendants for an accounting of the income and profits and for payment to him of a share thereof; that the defendants have not rendered such an accounting or paid over to the plaintiff any part

of the income, and now refuse to do so, and deny that plaintiff has any right therein; and that the defendant bank intends to continue to manage and control said property and receive and disburse the rents and profits therefrom without paying any part thereof to the plaintiff. Except as herein admitted, defendants deny the allegations contained in said paragraph.

VIII.

Answering Paragraph X, deny that plaintiff is entitled to any remedy at law [58] or in equity.

Fifth Defense

The Estate of Henderson Brooke Deady, through whom the plaintiff claims, has not been closed, and no order has been entered therein taking the right to possession of, or to the rents and profits from, Lot 1, Block 212, City of Portland, Oregon, from the Executor of the Estate of Henderson Brooke Deady.

Sixth Defense

The Estate of Charlotte Howell Deady, through whom plaintiff claims, has not been closed and no order has been entered therein taking the right to possession of, or to the rents and profits from, Lot 1, Block 212, City of Portland, Oregon, from the Executor of the Estate of Charlotte Howell Deady.

Seventh Defense

Lucy A. H. Deady, by the language used in her will, intended to give Henderson Brooke Deady only a defeasible fee in Lot 1, Block 212, City of Port-

land, Oregon, subject to be defeated in favor of Hanover Deady and Matthew Edward Deady by Henderson Brooke Deady's death under the circumstances under which it occurred.

Eighth Defense

Henderson Brooke Deady, Hanover Deady, Matthew Edward Deady, Joseph Simon (mentioned in the will of Lucy A. H. Deady), and the defendant The First National Bank, and Charlotte Howell Deady (mentioned in the will of Henderson Brooke Deady), and Robert H. Strong, the Executor of the Estate of Henderson Brooke Deady, at all times construed the will of Lucy A. H. Deady to mean, and said Lucy A. H. Deady to intend by said will, that Henderson Brooke Deady, upon the death of the testatrix, received only a defeasible fee in Lot 1, Block 212, City of Portland, Oregon, subject to be defeated by his death without leaving issue.

Ninth Defense

Henderson Brooke Deady, from the death of Lucy A. H. Deady to the time of his own death, represented to the defendants Hanover Deady and Matthew Edward Deady that Lucy A. H. Deady, by her will, intended to and did give him (Henderson Brooke Deady) only a defeasible fee in Lot 1, Block 212, City of Portland, [59] Oregon, which would be defeated in favor of Hanover and Matthew upon Henderson's death without leaving issue, and that under the will of said Lucy A. H. Deady he received

such an estate in said property, and that upon his death without leaving issue his interest in the property would go to them, subject to the power of appointment in favor of his wife given him in said will; and Henderson Brooke Deady intended them to act upon said representations, and they did act thereon to his benefit and their detriment. Henderson Brooke Deady at all times acquiesced in that interpretation of the will, elected to accept that interest, and waived any other interest. And the Executor of the Estate of Henderson Brooke Deady accepted and acquiesced in that interpretation of the will of Lucy A. H. Deady. And Charlotte Howell Deady accepted, acquiesced in, and elected to take under that interpretation of Lucy A. H. Deady's will. And the plaintiff is estopped to claim that Henderson Brooke Deady had any other or different estate or interest in the property.

Tenth Defense

From the death of Lucy A. H. Deady in August, 1923, up to the bringing of this suit in July, 1936, the plaintiff and the persons through whom he claims knew that the executors of the estate of Lucy A. H. Deady and the defendants herein considered and were acting upon the basis that Henderson Brooke Deady received under the will of Lucy A. H. Deady only a defeasible fee in Lot 1, Block 212, City of Portland, Oregon, together with the power of appointment given him in said will; and until shortly before the bringing of this suit no claim was made by

the plaintiff, or any person through whom he claims, that Henderson Brooke Deady received under said will any other estate in said Lot 1, Block 212. And no such claim was made until after the death of the attorney who prepared the will, the witnesses thereto, the executors named in said will, and other persons having information and knowledge concerning, and who would be able to give testimony to meet, the issues raised by the the amended complaint, and until after the loss or destruction of documentary and other evidence bearing on said issues. The testimony of said witnesses and said other evidence are irreplaceable. The right of action set forth in the amended complaint is barred by laches, and to allow the plaintiff, under the circumstances, to assert, [60] at this late date the claim he makes against these defendants, or any of them, is contrary to equity and good conscience.

Wherefore, defendants pray that the plaintiff's amended complaint be dismissed, and that judgment and decree be entered for the defendants and for their costs and disbursements herein.

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[Endorsed]: Filed January 31, 1949. G. H. Marsh,
Clerk, by F. L. Buck, Chief Deputy. [61]

And afterwards, to wit, on Monday, the 23rd day of December, 1940, the same being the 42nd Judicial day of the Regular November, 1940, Term of said Court; present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [62]

[Title of District Court and Cause.]

PRETRIAL ORDER

This suit coming on regularly for pre-trial, the plaintiff appeared by Robert F. Maguire and Donald K. Grant, his attorneys, and defendants appeared by Edgar Freed and Nicholas Jaureguy, their attorneys. And the application of the new Rules of Federal Procedure for District Courts of the United States having been deferred by order of this court until after its ruling upon defendants' motion to dismiss, it was stipulated by said parties that this pre-trial and the embodiment of the facts and issues of this case in the pre-trial order should not prejudice any rights the defendants might now have by reason of the overruling of their said motion to dismiss.

Thereupon, the parties further stipulated that the following are

AGREED FACTS

I.

That plaintiff is a citizen and resident of the State of Connecticut and is one and the same per-

son as Richard Howell Busek, a son of Charlotte Howell Deady, who is named in the last will and testament of the said Charlotte Howell Deady as her sole legatee and devisee, all of which more fully appears from the last will and testament of the said Charlotte Howell Deady, a copy of which is plaintiff's pre-trial exhibit number 2. [63]

II.

That the defendants, Matthew Edward Deady and Hanover Deady are citizens and residents of the State of Oregon.

III.

That the defendant, The First National Bank of Portland, is a national banking association organized and existing under the national banking laws of the United States of America with its office and principal place of business in the City of Portland, State of Oregon.

IV.

That the controversy herein involves money and property rights exclusive of interest and costs of a value in excess of \$3,000.00.

V.

That on and before the 29th day of August, 1923, the said Lucy A. H. Deady was seized in fee of the following described real property located and situated in the City of Portland, County of Multnomah, State of Oregon, towit:

Lot One (1), Block Two Hundred and Twelve (212), City of Portland, together with the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining.

That on or about said date the said Lucy A. H. Deady died leaving a last will and testament; that said will was duly and regularly proved, admitted to probate in the Circuit Court of the State of Oregon for Multnomah County, Probate Department, on the 5th day of September, 1923; that letters testamentary issued out of said court on the 15th day of September, 1923, to Joseph Simon and Henderson Brooke Deady as executors of the last will and testament of the said Lucy A. H. Deady, deceased, and administration of the estate of the said Lucy A. H. Deady was had thereunder; that said estate was closed and the First National Bank, then the executor, was discharged on the 6th day of March, 1936; that said last will and testament of the said Lucy A. H. Deady in words and figures is substantially as follows, to-wit: [64]

In the Name of God, Amen: I, Lucy A. H. Deady, of Portland, Oregon, widow of the later

Matthew P. Deady, make this the following my

Last Will and Testament, that is to say:

First: I will and direct that all my just debts and funeral expenses be paid.

Second: I request and direct that my body be interred by the side of my late husband, Matthew P. Deady, in Riverview Cemetery.

Third: Subject to the conditions, provisions and charges thereon hereinafter made, I give, devise and bequeath to my son Henderson Brooke Deady, the undivided two thirds of Lot numbered One (1) in Block numbered Two Hundred and Twelve (212) of the City of Portland, Oregon.

Fourth: Subject to like conditions, provisions and charges thereon, I give, devise and bequeath to my two grandsons, Matthew Edward Deady and Hanover Deady, the remaining undivided one-third of said Lot 1, Block 212, Portland, Oregon.

Fifth: I direct that from the income derived from said Lot numbered 1 in Block numbered 212, there be paid to Mary E. Deady, widow of my deceased son, Edward Nesbith Deady, the sum of \$150.00 per month during the term of her natural life, and that there be paid to Marye Thompson Deady, who was the wife of my son Paul R. Deady, the sum of \$75.00 per month, so long as she survives and remains unmarried.

I further direct that the remainder of the income derived from the real property shall be distributed as follows:

(a) To the payment of each of my grandsons,—Matthew Edward Deady and Hanover

Deady, the sum of \$100.00 per month, and the remainder of said income shall be paid to my son, Henderson Brooke Deady. Such division of the income derived from the said real property to continue during the lifetime of my son, Henderson Brooke Deady.

Provided further, that from the income derived from said real property, and before the distribution of the same, there shall be paid therefrom, the inheritance tax properly chargeable against my estate, or the legacies or divisions made, and after the payment of such inheritance tax, there shall be created a sinking fund of not less than \$1000.00 nor more than \$2500.00 per year, in discretion of my Executors for the purpose of retiring and paying off the mortgage debt created and existing against said Lot numbered 1, Block numbered 212.

Sixth: I will and direct that said Lot numbered One (1) in Block numbered Two Hundred and Twelve (212), Portland, Oregon, shall neither be mortgaged, partitioned, sold, or otherwise encumbered by my devisees except for the improvement of the same, until the expiration of twenty-five (25) years from the date of my decease, and the devises to my said son Henderson Brooke Deady, and to my grandsons, Matthew Edward Deady and Hanover Deady, contained in items three and four hereof, are upon the express condition that said

property shall not be disposed of or encumbered during the period aforesaid. Provided, however, that said real property may be encumbered by mortgage to renew the present mortgage, or such portion thereof as may from time to time remain unpaid.

Seventh: That in the event my son Henderson Brooke Deady die without issue, the undivided two-thirds of Lot numbered 1 in Block [65] numbered 212, shall vest in my grandsons hereinbefore named, and I give and devise the same to my said grandsons.

Eighth: I authorize and permit my son Henderson Brooke Deady, if he so elects to do, to bequeath by last Will and Testament to his wife (if he then has a wife), the income that would have been derived by him if living, from the two-thirds of Lot 1, Block 212, City of Portland. Such bequest to continue only during the lifetime of the widow of said Henderson Brooke Deady.

Ninth: The monthly payments directed to be made to my grandsons, and the residue of income directed to be paid to my son Henderson Brooke Deady, provided for in Item Fifth of this Will, shall continue for a period of ten years after my death, and thereupon and thereafter the net income derived from said Lot 1 in Block 212 of the City of Portland, shall follow the title and ownership of said real property, and shall be distributed, two-thirds

to my son Henderson Brooke Deady, and the remaining one-third to my two grandsons, subject to the payment of the legacies bequeathed to Mary E. Deady and Marye Thompson Deady, in said Fifth item specified. It is my wish that my executors provide out of the residue of the income bequeathed to my son, Henderson Brooke Deady, in Item Fifth, funds at their discretion, to further any legitimate or worthy ambition or aim, other than business ventures which my grandsons Matthew, Paul and Hanover or either of them, may undertake or entertain.

Tenth: I give, devise and bequeath to my son Henderson Brooke Deady, that certain parcel of real estate situated and being in Mountain View Park heretofore conveyed to me by my son Edward Nesmith Deady.

Eleventh: I give and bequeath to my grandson Hanover Deady my law library.

Twelfth: All the rest, residue and remainder of the property of which I shall be seized, of whatever nature and wheresoever situated, I give, devise and bequeath to my son Henderson Brooke Deady and to my grandsons Matthew Edward Deady and Hanover Deady; to Henderson Brooke Deady the undivided two thirds thereof, and to Matthew Edward Deady the undivided one-sixth thereof, and to Hanover Deady the remaining undivided one-sixth thereof.

Lastly: I hereby nominate and appoint my son Henderson Brooke Deady, and my friend Joseph Simon, of Portland, Oregon, to be the Executors of this my Last Will and Testament, and also Trustees to manage my estate, and I direct that no bond or security shall be required of them as such Executors or Trustees. I also direct that in the event of the death, resignation or disqualification of all of my said Executors, and Trustees named herein, the Security Savings and Trust Company, of Portland, Oregon, shall then complete the execution of said Estate, and serve as Trustee thereof.

I hereby revoke all former wills by me at any time made.

In Witness Whereof, I have hereunto set my hand and seal this the 29th day of July, A. D. 1920, at Portland, Oregon.

(Signed) LUCY A. H. DEADY (Seal)

The above instrument of writing was signed by Lucy A. H. Deady, the Testatrix therein named, in the presence of us, who at her request and in her presence, and in the presence of each other have subscribed our names as witnesses thereto.

(Signed) CHESTER V. DOLPH, Residing at Portland, Or.

(Signed) J. V. BEACH, Residing at Portland, Or. [66]

That the real property first described in this paragraph constituted the major portion of said Lucy A. H. Deady's estate, and at the time of her death was profitably leased for a long period of years and was yielding substantial revenue; and that said lease is, in a modified form, still in existence and has a number of years to run.

VI.

That after the death of Lucy A. H. Deady, no conveyance of any title to said property was made by Henderson Brooke Deady during his lifetime and that the said Henderson Brooke Deady died having had no issue and leaving no issue him surviving, on or about the 28th day of May, 1933, leaving a last will and testament wherein and whereby he devised and bequeathed all of his property, real and personal, to his wife, Charlotte Howell Deady; that a copy of the last will and testament of said Henderson Brooke Deady is plaintiff's pre-trial Exhibit 1; that the said last will and testament was, on the 18th day of July, 1933, duly and regularly proved and admitted to probate in the Circuit Court of Multnomah County, State of Oregon, Department of Probate, and administration of said estate commenced thereunder by letters dated July 18, 1933, appointing Robert H. Strong as executor thereof, who thereafter and on the 18th day of July, 1933, duly qualified and became such executor; that on July 18, 1933, Robert H. Strong named in said will as executor, filed his petition for

the probate thereof, and a copy of said petition is defendants' pre-trial Exhibit A; and on June 14, 1935, said Robert H. Strong, as such executor, filed the inventory and appraisement of said estate, and a copy of said inventory and appraisement is defendants' pre-trial Exhibit B.

VII.

That the said Charlotte Howell Deady died on or about the 12th day of July, 1935, leaving a last will and testament wherein [67] and whereby she devised and bequeathed all of her property, real, personal and mixed, to the plaintiff, her son, otherwise known and named in said will as Richard Howell Busek; that a copy of said last will and testament of the said Charlotte Howell Deady is plaintiff's pre-trial Exhibit 2; that on the 22nd day of July, 1935, said last will and testament of the said Charlotte Howell Deady was duly and regularly proved and admitted to probate in the State of Connecticut and that on said date the plaintiff herein was appointed and qualified as executor of the said last will and testament of the said Charlotte Howell Deady.

That all steps up to and including the filing of the final account have been taken in the administration of said estate; that the creditors of said Charlotte Howell Deady have been paid and that upon the termination of this suit and the determination of any estate tax or inheritance tax which may be due by reason of any interest in said Lot 1,

Block 212, Portland, which may be determined to have passed to plaintiff, said estate will be ready for publication of final notice and closing. That no report has yet been made by the executor of said estate relative to Federal Inheritance Taxes.

VIII.

That there exists between the plaintiff and defendants herein an actual bona fide and justifiable controversy within the meaning of the provisions of Title 28 U. S. C. A., Sec. 400, which said controversy involves in part the construction and legal interpretation of the said last will and testament of the said Lucy A. H. Deady and depends for its determination upon a judicial declaration of the legal rights of this plaintiff thereunder; but in admitting the existence of this controversy, the defendants do not waive any of their defenses involved in the issues of law hereinafter set forth, and do not admit that the plaintiff is a proper party to bring this suit, or that necessary parties are not lacking; that the said controversy is substantially as follows:

(a) That the plaintiff, as successor in interest, [68] by successive testamentary devises of Henderson Brooke Deady as hereinbefore alleged, claims and asserts that he is the owner in fee simple of an undivided two-thirds of said Lot 1, Block 212, Portland, Oregon, and is entitled to two-thirds of the rents, profits and income therefrom, subject only to a charge thereon for payment of the lega-

cies and annuities in said will contained from and after the 12th day of July, 1935, being the date of the death of Charlotte Howell Deady from whom the plaintiff has inherited.

It is the specific contention of plaintiff that paragraph 3 of the said last will and testament of Lucy A. H. Deady constitutes a testamentary disposition in fee simple absolute and that the "conditions, provisions and charges" to which said devise is made subject, relate only to the lawful conditions, charges and provisions contained in paragraphs fifth, sixth and ninth of said will to which the testamentary gift to defendants Matthew Edward Deady and Hanover Deady are likewise subject; that paragraph seventh of said will is not to be construed as any condition to or limitation on or reduction or possible defeasance of the fee estate devised to Henderson Brooke Deady in paragraph 3; that the said paragraph seventh related to and was applicable only on the contingency of the death of Henderson Brooke Deady prior to that of Lucy A. H. Deady; that this contingency did not occur and Henderson Brooke Deady became seized on the death of Lucy A. H. Deady of an estate of inheritance which he devised on his death to his widow, Charlotte Howell Deady, and which she, the said Charlotte Howell Deady, devised to this plaintiff, the said rightful owner thereof; that if paragraph seventh of the last will and testament of Lucy A. H. Deady did not refer to the contingency of the death of Hen-

derson Brooke Deady prior to the death of the testatrix, it only provided for an executory devise to the two grandsons of Lucy A. H. Deady in case Henderson Brooke Deady died without issue; that the provisions of paragraph seventh of said last will and testament and if it be an executory devise contained therein, are invalid and [69] void under the rule as to perpetuities.

That the defendants contend that under the will of Lucy A. H. Deady there was devised to Henderson Brooke Deady a defeasible fee estate in Lot 1, Block 212, City of Portland, Oregon, subject to be defeated upon his death without issue, and a power of appointment to be exercised by him in favor of his wife as provided in the Eighth Item of said will, and that upon the death of Henderson Brooke Deady without issue, even though subsequent to the death of the testatrix, his said estate in said Lot 1, Block 212, was defeated and his widow, Charlotte Howell Deady, received only the interest created by his exercise of the power of appointment, and did not receive an estate of inheritance in said property.

(b) That the plaintiff further contends that the said defendant, The First National Bank of Portland, is without authority to manage said property and collect and disburse the profits and income therefrom since its discharge as executor of the estate of Lucy A. H. Deady; that said right as exercised by the defendant, The First National Bank of Portland, is an incident of ownership and there-

fore accrues to the devisees or their successors upon the distribution of the property to them and the discharge of the executor; that the said last will and testament of the said Lucy A. H. Deady does not create a valid or any trust since there is no trust res conveyed to, settled upon, or vested in any person or persons for the benefit of another, and that the use of the word "trustee" in the last paragraph of said will in the absence of any language creating a trust is not sufficient to vest any persons or corporation therein named as "trustees" with any property, interest, title or right sufficient to constitute said persons as trustees or to clothe them with the power and authority of a trustee, that consequently the management of said real property by the defendant, The First National Bank, and the collection and disbursement of the income therefrom, is an invasion of the plaintiff's property rights and has resulted and will continue to result in [70] pecuniary damage to plaintiff in a substantial amount.

(c) That plaintiff further contends that paragraph sixth of said will is invalid, void and of no force and effect, insofar as it purports to impose a limitation on the power of the devisees in said will named and their successors to partition, encumber or alienate the real property therein named and involved herein for an absolute period of twenty-five years after the death of the testatrix; that such attempted and purported limitation vio-

lates the rule against perpetuities and therefore must fail.

(d) That the plaintiff further contends that paragraph fifth of said will is invalid and void and without force or effect, under the rule as to perpetuities, for the reason that the provision contained therein "That from the income derived from said real property, and before the distribution of the same, there shall be paid therefrom the inheritance tax properly chargeable against my estate, ^{and} the legacies or divisions made, and after the payment of such inheritance tax, there shall be created a sinking fund of not less than \$1,000 or more than \$2,500 per year, in discretion of my executors, for the purpose of retiring and paying off the mortgage debt created and existing against said Lot numbered 1, Block numbered 212", provides for the accumulation from the income from said property, for more than lives in being, at the time of the death of the testator, plus twenty-one years. That said provision being invalid, void and of no effect, the provision for the payment of any legacies whatsoever, from the income from said estate, is also invalid and void.

IX.

That Joseph Simon, executor of the estate of Henderson Brooke Deady, died on the 14th day of February, 1935, and the defendant, The First National Bank of Portland, was, on the 27th day of February, 1935, appointed and qualified as executor of the

estate of said Lucy A. H. Deady, deceased, and continued as such until the 6th day of March, 1936, when the estate of said Lucy A. H. Deady was closed and the [71] defendant, The First National Bank of Portland, was discharged as executor.

X.

That said bank every since the 27th day of February, 1935, has managed and controlled said Lot 1, Block 212, and collected, received and disbursed the income therefrom, purporting to act as trustee* of said estate; and that the plaintiff does not know the amount of money received by said bank from said property since the 6th day of March, 1936, and the disposition thereof; that a portion of said income has been, and is being, paid to the defendants, Matthew Edward Deady and Hanover Deady by said bank; that plaintiff has made a demand upon each of the defendants for an accounting of the income and profits and for payment to him of a share thereof; that the defendants have not rendered such an accounting or paid over to the plaintiff any part of the income, and now refuse to do so, and deny that plaintiff has any right therein; and that the defendant bank intends to continue to manage and control said property and receive and disburse the rents and profits therefrom without paying any part thereof to the plaintiff.

*In using the words "purporting to act as trustee" here, the parties are not agreeing either that the bank was or that it was not qualified so to act,—that being one of the issues in this case.

Agreed Facts Concerning Defenses**

XI.

This suit was begun on or about July 11, 1936.

XII.

At the time of the death of Lucy A. H. Deady, Henderson Brooke Deady was married to Amalie B. Deady. At that time they were separated and thereafter divorce proceedings were commenced. Henderson Brooke Deady and Amalie B. Deady thereafter arrived at a property settlement and a decree of divorce was granted in the Circuit Court of the State of Oregon for Multnomah County to Amalie B. Deady against said Henderson Brooke Deady. A copy of the complaint in said divorce proceedings, [72] with the property settlement which was entered into by the parties and approved by the Court, attached thereto, is defendants' pre-trial Exhibit C.

XIII.

Subsequent to the death of Lucy A. H. Deady and on or about the 3rd day of September, 1924, a suit in equity was filed in the Circuit Court of the State of Oregon for Multnomah County by Marye Thompson Deady, one of the beneficiaries mentioned in

**In agreeing to the existence of any facts hereinafter set out, the plaintiff does not waive his right to object to their competency, relevancy or materiality nor waive his right to require the court to rule on each of the Issues of Law hereinafter set out.

paragraph Fifth of the Last Will and Testament of Lucy A. H. Deady, deceased, and widow of Paul R. Deady, one of the sons of Lucy A. H. Deady, in which said suit Matthew Edward Deady, Hanover Deady, Henderson Brooke Deady, and all other beneficiaries under said will, and the executors thereof, were defendant. Said suit sought a decree to the effect that said Lucy A. H. Deady had held the legal title to one-third of said Lot 1, Block 212, City of Portland, Oregon, in trust for said Paul R. Deady and his heirs, subject to a life estate in favor of Lucy A. H. Deady, and sought to impose a trust upon said one-third interest of said real property in favor of said Marye Thompson Deady. All of said defendants joined in the defense of said suit throughout, filing a general demurrer to the original complaint, which demurrer was sustained; thereafter said plaintiff filed her amended complaint in said cause, a copy of which is defendants' pretrial Exhibit D.

Said suit was eventually compromised by an agreement of the parties to the effect that the monthly payments to be paid to said Marye Thompson Deady from the income of said real property be increased from the sum of \$75 per month as provided in said will to the sum of \$150 per month, and that such payments should continue during the natural life of said Marye Thompson Deady. A copy of the agreement of compromise is defendants' pretrial Exhibit E.

XIV.

Between the date of the death of Lucy A. H. Deady, August 29, 1923, and the date of the death of Charlotte Howell Deady, July 12, 1935, there were paid, from the income of Lot 1, Block 212, City of [73] Portland, Oregon, the following sums to the following persons, respectively:

Mary E. Deady (The widow of Edward Nesmith Deady)

From Dec. 1923 to May 10, 1935 (date of death).....\$150 per month

Marye T. Deady (Widow of Paul R. Deady)

From Sept. 1923 to Oct. 1925.....\$ 75 “ “

Subsequent to Nov., 1925.....\$150 “ “

Henderson B. Deady (not including Executor's fees)

From Dec. 18, 1923 to Jan. 1, 1925 (inc.).....\$300 “ “

From Feb. 3, 1925 to Nov. 3, 1925 (inc.).....\$400 “ “

From Dec. 2, 1925 to Feb. 1, 1927 (inc.).....\$475 “ “

From Mar. 1, 1927 to May 1, 1928 (inc.).....\$500 “ “

From June 1, 1928 to Dec. 30, 1930 (inc.).....\$750 “ “

From Feb. 1, 1931 to June 22, 1931 (inc.).....\$400 “ “

From July 1, 1931 to May 28, 1933 (inc.)
(date of death) \$600 “ “

Plus: 4/25/33—from surplus.....\$300

Robert Strong (As executor of the estate of Henderson

Brooke Deady which were paid by said executor to and

for the benefit of Charlotte H. Deady)

From June, 1933 to July 12, 1935 (date of death of
Charlotte Howell Deady).....\$600 “ “

Hanover Deady

From Dec. 18, 1923 to June 22, 1931 (inc.).....\$100 “ “

From July 31, 1931 to July 12, 1935.....\$150 “ “

Plus: 4/25/33—from surplus.....\$150

Matthew E. Deady

From Dec. 18, 1923 to June 22, 1931 (inc.).....\$100 “ “

From July 31, 1931 to July 12, 1935.....\$150 “ “

Plus: 4/25/33—from surplus.....\$150

XV.

At the date of each accounting rendered to the Probate Court by the Executors of the Estate of Lucy A. H. Deady, the amount of cash on hand in said estate was as follows:

Balance of cash on hand at date of 1st Accounting	Sep. 15, 1924	\$934
“ “ “ “ “ “ “ “ 2nd “	Sep. 1, 1925	3,192
“ “ “ “ “ “ “ “ 3rd “	Oct. 31, 1927	2,333
“ “ “ “ “ “ “ “ 4th “	Nov. 30, 1928	1,544
“ “ “ “ “ “ “ “ 5th “	Dec. 2, 1929	1,606
“ “ “ “ “ “ “ “ 6th “	Jan. 3, 1931	463
“ “ “ “ “ “ “ “ 7th “	Nov. 3, 1932	937
“ “ “ “ “ “ “ “ 8th “	Apr. 5, 1934	2,402
“ “ “ “ “ “ “ “ 9th “	Feb. 14, 1935	1,687
(On Joseph Simon's death)		
“ “ “ “ “ “ “ “ Final “	Dec. 2, 1935	428
(Bank)		

XVI.

At the date of the death of Lucy A. H. Deady, said Lot 1, Block 212 was encumbered by a first mortgage executed by her on December 12, 1917, in the sum of \$40,000.00, with interest at 6% in favor of The Northwestern Mutual Life Insurance Company, due and payable ten years from the date thereof. There remained unpaid on the principal of said mortgage at the date of Lucy A. H. Deady's death the sum of \$40,000.00. On January 13, 1928, said mortgage was extended for a period of five years to December 12, 1932, with the privilege of paying \$1,-

600.00 or more on the principal on December 12, 1929, and at interest periods thereafter, with interest at 5% payable semi-annually. Thereafter, on December 20, 1932, the mortgage was further extended for a period of five years to December 12, 1937, with the privilege of paying \$1,000.00 or more on December 12, 1934, and on interest dates thereafter, with interest at 5½% payable semi-annually. There were paid upon the principal of said mortgage by the Executors the following sums and none other:

Principal of Mortgage at Date of Death		\$40,000.00
Dec. 5, 1930.....	2,500.00	
June 2, 1931.....	2,000.00	
Dec. 4, 1931.....	1,500.00	
June 8, 1932.....	1,000.00	
June 5, 1933.....	1,000.00	
June 7, 1934.....	2,000.00	
July 6, 1935.....	1,000.00	11,000.00
Balance due		\$29,000.00

XVII.

After the death of Henderson Brooke Deady, Charlotte Howell Deady, his widow, paid or caused to be paid to Amalie B. Deady, Henderson Brooke Deady's first wife, the sum of \$200.00 per month until the death of Charlotte Howell Deady out of the moneys said Charlotte Howell Deady received from the Executor of the Estate of [75] Henderson Brooke Deady, being a part of the moneys received by said Executor from the Executor of the estate

of Lucy A. H. Deady referred to in paragraph XIV hereof.

XVIII.

Subsequent to the death of Henderson Brooke Deady, the Executor of the Estate of Lucy A. H. Deady paid to the Treasurer of the State of Oregon, the sum of \$2,500.00 as inheritance tax arising and due from said Estate of Lucy A. H. Deady by reason of the exercise by Henderson Brooke Deady in his will in favor of Charlotte Howell Deady of the power of appointment set forth in Paragraph Eighth of the will of Lucy A. H. Deady.

XIX.

The assets of the Lucy A. H. Deady Estate, together with the appraised value thereof, at the time of her death, as shown by the inventory and appraisal on file in said estate were as follows:

Lot 1, Block 212, City of Portland.....	\$275,000.00
All other assets.....	1,347.02

The estate of Lucy A. H. Deady paid a federal estate tax in the sum of \$3223.57 and Oregon state estate and inheritance taxes in the amounts set out in the order to fix such taxes, a copy of which is defendants' pretrial Exhibit F, exclusive of the payment referred to in paragraph XVIII hereof.

XX.

At the time of the execution of her last will, Lucy A. H. Deady was 86 years of age, and at the date of

her death her age was 89 years. At the time of the execution of her will, and also at the time of her death, she had one living child, Henderson Brooke Deady, and two deceased children, Paul Deady and Edward Deady; three daughters-in-law, Amalie B. Deady (then the wife of Henderson Brooke Deady), Marye T. Deady (widow of Paul R. Deady), and Mary E. Deady (widow of Edward Deady); two grandchildren, Matthew Edward Deady and Hanover Deady, children of Edward Deady. At the time of the execution of Lucy A. H. Deady's last will, Henderson Brooke Deady was 51 years of age, [76] Matthew Edward Deady was 31 years of age, and Hanover Deady was 28 years of age. At the time of the execution of Lucy A. H. Deady's last will and testament, Henderson Brooke Deady was, and for a long time had been, living apart and separated from his wife, Amalie B. Deady.

XXI.

At all times since June 18, 1933, Robert H. Strong has been and now is the duly qualified and acting executor of the estate of Henderson Brooke Deady, deceased.

Exhibits

The following exhibits were offered by plaintiff at the pretrial and identified.

Plaintiff's Pretrial Exhibit No. 1—Last Will and Testament of Henderson Brooke Deady.

Plaintiff's Pretrial Exhibit No. 2—Last Will and Testament of Charlotte Howell Deady.

Plaintiff's Pretrial Exhibit No. 3—Carbon copy of letter dated March 14, 1936, from Maguire, Shields & Morrison to Matthew Edward Deady and Hanover Deady.

Plaintiff's Pretrial Exhibit No. 4—Letter dated June 7, 1935, from Wilbur, Beckett, Howell & Oppeheimer to Robert F. Maguire.

Plaintiff's Pretrial Exhibit No. 5—Carbon copy of letter dated June 7, 1935, from Maguire, Shields & Morrison to Ralph W. Wilbur.

[It is hereby stipulated that the pre-trial order may be and is hereby amended by adding on page 15, at the end of plaintiff's pre-trial exhibits, the following:

Plaintiff's Pretrial Exhibit No. 9—Letter of Ralph W. Wilbur, dated July 15, 1933;

Plaintiff's Pretrial Exhibit No. 10—Letter of Joseph Simon, dated July 17, 1933.

The defendants admit the authenticity of each of said letters, but reserve their objections to each of the same on the ground that each is irrelevant, immaterial and incompetent.]

Amendment allowed by consent Jan. 23, 1941.

JAMES ALGER FEE

Defendants admit the authenticity of Plaintiff's Pre-Trial Exhibits 4 and 5, but reserve objections on the grounds that same are irrelevant, immaterial and incompetent.

Plaintiff's Pre-Trial Exhibits 6, 7 and 8 are sealed in an envelope and the envelope containing

them is committed to the custody of the Clerk and not to be produced by him except at the trial and not to be opened at any time except on order of the Court. All objections to any of said Exhibits 6, 7 or 8 are reserved to the defendants.

The following exhibits were offered by defendants at the pretrial and identified. [77]

Defendants' Pretrial Exhibit A—Copy of Petition for Probate of the will of Henderson Brooke Deady.

As to Exhibit A, the plaintiff admitted the authenticity of the document,* but reserved his objections to its receipt in evidence on the ground that it is wholly irrelevant and immaterial to any issue in the case and incompetent to prove any issue in the case, and that any petition of the probate of a will can have no evidentiary value as to the intention of

*The plaintiff in admitting the authenticity of any documents merely admitted that they were made and signed and bore the signatures and have the contents shown in the copies, but did not admit or concede that they are receivable in evidence or that the documents themselves are binding upon any of the parties signing them or to whom they may have been addressed or by whom they may have been written. Plaintiff also admitted that where an instrument on its face purports to have been filed in a court that it was filed in that particular court and agreed that when copies have been produced whose authenticity is agreed upon, that plaintiff does not demand that the original be produced, and if received the copies may be received with the same force and effect as though the original had been produced.

the testator drawing another and different will or to bind either the decedent named in the petition for probate or his successors in interest or title.

Defendants' Pretrial Exhibit B—Copy of Inventory and Appraisement of the Estate of Henderson Brooke Deady.

With regard to Exhibit B, the plaintiff conceded the authenticity of the document and reserved the same objections on the same grounds as stated as to the previous exhibit.

Defendants' Pretrial Exhibit C—Copy of Complaint for divorce, with agreement attached thereto, in the case of Henderson Brooke Deady v. Amalie B. Deady.

As to Exhibit C, the plaintiff concedes the authenticity of the document, but reserved objections to its receipt in evidence on the ground that it is irrelevant and immaterial to any issue in the case, incompetent to prove any issue, and that the same does not constitute any act on the part of the decedent Henderson Brooke Deady which would in any wise limit, change or destroy the estate which he may have received under the will of his mother, Lucy A. H. Deady.

Defendants' Pretrial Exhibit D—Copy of Amended Complaint Marye T. Deady v. Henderson Brooke Deady, et al.

As to Exhibit D, the plaintiff conceded the authenticity of the document, but reserved objections to

its receipt in evidence on the ground that it is irrelevant and immaterial to any issue in the case and incompetent to prove or disprove any issue in the case or to change [78] in any way the rights of the parties or to limit, change or destroy the estate of Henderson Brooke Deady.

Defendants' Pretrial Exhibit E—Copy of compromise agreement between Marye Thompson Deady, Henderson Brooke Deady, et al.

As to Exhibit E, plaintiff conceded the authenticity of the document, but reserved objections to its receipt in evidence upon the ground that it is immaterial and irrelevant to prove or disprove any issue in the case and incompetent to prove any issue in the case or to change the rights, interest and estates of the decedent, Henderson Brooke Deady.

Defendants' Pretrial Exhibit F—Copy of Order of Multnomah County Probate Court of April 21, 1924, determining state inheritance tax in Lucy A. H. Deady estate.

As to Exhibit F, plaintiff conceded the authenticity of the document and reserved objections as to its relevancy, materiality and its competency to prove any issue of the case or to change, modify or destroy any estate or interest of the decedent, Henderson Brooke Deady.

Defendants' Pretrial Exhibit G—Unexecuted agreement between Charlotte Howell Deady, Hanover Deady, et al, dated October 22, 1934.

As to Exhibit G, plaintiff conceded it was the original but objected to it as irrelevant and immaterial, incompetent to prove any issue in the case, it being a non-executed document, one which was made in the matter of a proposed compromise settlement between Charlotte Howell Deady and Hanover and Matthew F. Deady and their respective wives which never became effective and which was canceled and terminated. [79]

Defendants' Pretrial Exhibit H—Copy of Affidavit of Henderson Brooke Deady, dated October 29, 1925.

As to Exhibit H, the plaintiff conceded the authenticity of the document, reserved objections to the relevancy and materiality of the same or its competency to prove or disprove any issue in the case or to change, modify or destroy the estate of Henderson Brooke Deady in the property in question.

Defendants' Pretrial Exhibit I—Copy of Stipulation, Lucy A. H. Deady, Estate, dated October, 1924.

As to Exhibit I, the plaintiff conceded the authenticity of the documents, but reserved his objection to the relevancy and materiality thereof and their competency to establish any issue in the case or to

change, modify or destroy any estate in Henderson Brooke Deady.

Defendants' Pretrial Exhibit J—Copy of Stipulation, Lucy A. H. Deady Estate, dated December 18, 1923.

As to Exhibit J, the plaintiff conceded the authenticity of the documents but reserved his objection to the relevancy and materiality thereof and their competency to establish any issue in the case or to change, modify or destroy any estate in Henderson Brooke Deady.

Defendants' Pretrial Exhibit K—Copy of Stipulation, Lucy A. H. Deady Estate, dated August, 1931.

As to Exhibits K, the plaintiff conceded the authenticity of the documents, but reserved his objection to the relevancy and materiality thereof and their competency to establish any issue in the case or to change, modify or destroy any estate in Henderson Brooke Deady.

Defendants' Pretrial Exhibit L—Copy of Stipulation for Settlement of Inheritance Tax in Lucy A. H. Deady Estate, dated September, 1935.

As to Exhibit L, plaintiff admitted the authenticity of the document, but reserved objections to the relevancy and materiality thereof and the competency of the same to prove or disprove any issue

in the case or to change, modify or destroy the estate of Henderson Brooke Deady, that of Charlotte Howell Deady, or plaintiff Richard [80] Howell.

Defendants' Pretrial Exhibit M—Copy of Petition for determination of Inheritance Tax in Lucy A. H. Deady Estate, filed Oct. 1, 1935.

As to Exhibit M, plaintiff admitted the authenticity of the document, but reserved objections to the relevancy and materiality thereof and the competency of the same to prove or disprove any issue in the case or to change, modify or destroy the estate of Henderson Brooke Deady, that of Charlotte Howell Deady, or plaintiff, Richard Howell.

Defendants' Pretrial Exhibit N—Copy of Order fixing Inheritance Tax in Lucy A. H. Deady Estate, dated October 1, 1935.

As to Exhibit N, plaintiff admitted the authenticity of the document, but reserved objections to the relevancy and materiality thereof and the competency of the same to prove or disprove any issue in the case or to change, modify or destroy the estate of Henderson Brooke Deady, that of Charlotte Howell Deady, or plaintiff, Richard Howell.

Defendants' Pretrial Exhibit O—Copy of letter of May 16, 1935, From Oregon State Treasurer to First National Bank.

As to Exhibit O, the plaintiff admitted the authenticity of the document but reserved his objections

to the relevancy and materiality thereof and that the same is incompetent to prove or disprove any issue in the case or to change, modify or destroy any estate either of Henderson Brooke Deady, Charlotte Howell Deady, or Richard Howell in the premises in question.

Defendants' Pretrial Exhibit P—Copy of letter of May 23, 1935, from Robert F. Maguire to First National Bank.

As to Exhibit P, the plaintiff admitted the authenticity of the document but reserved his objections to the relevancy and materiality thereof and that the same is incompetent to prove or disprove any issue in the case or to change, modify or destroy any estate either of Henderson Brooke Deady, Charlotte Howell Deady, or Richard Howell in [81] the premises in question.

Defendants' Pretrial Exhibit Q—Letter of November 25, 1923, from R. W. Wilbur to Joseph Simon.

As to Exhibit Q, the plaintiff admitted the authenticity of the document but reserved his objections to the relevancy and materiality thereof and that the same is incompetent to prove or disprove any issue in the case or to change, modify or destroy any estate either of Henderson Brooke Deady, Charlotte Howell Deady, or Richard Howell in the premises in question, and made the further objection that

correspondence between the writers thereof could have no effect upon the rights of the party, wholly incompetent.

Defendants' Pretrial Exhibit R—Carbon copy of letter dated October 26, 1923, from Joseph Simon to Wilbur, Beckett & Howell.

As to Exhibit R, the plaintiff admitted the authenticity of the document but reserved his objections to the relevancy and materiality thereof and that the same is incompetent to prove or disprove any issue in the case or to change, modify or destroy any estate either of Henderson Brooke Deady, Charlotte Howell Deady, or Richard Howell in the premises in question, and made the further objection that correspondence between the writers thereof could have no effect upon the rights of the party, wholly incompetent.

Issues of Fact

1.* Whether or not, upon the death of Lucy A. H. Deady, Henderson Brooke Deady became vested with title to an undivided two-thirds interest in Lot 1, Block 212, City of Portland, in fee simple absolute, subject to certain charges and encumbrances, but not subject to be defeated by his death thereafter without issue. In determining this ultimate

*Defendants contend that this issue should be included as an issue of law only and that the determination of whether or not this is actually an issue of ultimate fact constitutes a preliminary issue of law.

issue of fact, certain other issues are included. These issues may be stated as follows. [82]

1a.** Whether or not Lucy A. H. Deady intended by her will to devise to Henderson Brooke Deady an estate in Lot 1, Block 212, City of Portland, in fee simple absolute in the event he should survive her.

1b.** Whether or not by paragraph seventh of her will Lucy A. H. Deady intended to provide for disposition of said property in the event of the death of Henderson Brooke Deady prior to her own death.

1c.** If not, then whether or not Lucy A. H. Deady intended by her will to give Henderson Brooke Deady only a defeasible fee in said property, subject to be defeated in favor of Hanover Deady and Matthew Edward Deady by the death of Henderson Brooke Deady under the circumstances under which it occurred.

2. Whether or not there has been any waiver, estoppel or election which would prevent plaintiff from asserting that at the death of Lucy A. H. Deady, Henderson Brooke Deady became vested with title to an undivided two-thirds interest in Lot 1, Block 212, City of Portland, in fee simple absolute, subject to certain charges and encumbrances

**Plaintiff claims that these issues have been already determined in his favor by the court on its ruling on defendants' motion to dismiss, and whether or not they have been so determined, constitutes a preliminary issue of law.

but not subject to be defeated upon the death of Henderson Brooke Deady thereafter without issue.*** This ultimate issue embodies a determination of the following issues:

2a. Whether or not Henderson Brooke Deady, Hanover Deady, Matthew Edward Deady, Joseph Simon (mentioned in the will by Lucy A. H. Deady) and the defendant The First National Bank and Charlotte Howell Deady (mentioned in the will of Henderson Brooke Deady), and [83] Robert H. Strong, the Executor of the Estate of Henderson Brooke Deady, construed the will of Lucy A. H. Deady to mean, and said Lucy A. H. Deady to intend by said will, that Henderson Brooke Deady, upon the death of the testatrix, received only a defeasible fee in Lot 1, Block 212, City of Portland, Oregon, subject to be defeated by his death without leaving issue.

2b. Whether or not Henderson Brooke Deady, from the death of Lucy A. H. Deady to the time of

***To this issue and to each of the following purported issues of fact, plaintiff objects on the ground and for the reason that each of these issues are predicated on wholly incompetent, irrelevant and immaterial evidence, and that even if each issue be answered in the affirmative, the facts so found would not affect or diminish the title of plaintiff or his predecessors in title, and said facts would not be competent, relevant or material to establish any defense to this suit. This objection is made as a continuing one to each of the following issues of fact.

his death, represented to the defendants Hanover Deady and Matthew Edward Deady that Lucy A. H. Deady, by her will, intended to and did give him (Henderson Brooke Deady) only a defeasible fee in Lot 1, Block 212, City of Portland, Oregon, which would be defeated in favor of Hanover and matthew upon Henderson's death thereafter without leaving issue, and that under the will of said Lucy A. H. Deady he received such an estate in said property, and that upon his death without leaving issue his interest in the property would go to them, subject to the power of appointment in favor of his wife given him in said will.

(i) If so, whether or not Henderson Brooke Deady intended that Hanover Deady and Matthew Deady should act on said representations.

(ii) If so, whether or not Matthew Edward Deady and Hanover Deady did act thereon, and if they did act thereon, then

(iii) Whether or not their action was to the benefit of Henderson Brooke Deady, and

(iv) Whether or not their action was to their own detriment.

2c. Whether or not Henderson Brooke Deady acquiesced in the interpretation of the will, set out in Issue No. 2b supra, and elected to accept that interest and waived any other interest.

2d. Whether or not the Executor of the Estate of Henderson Brooke Deady accepted and acquiesced in the interpretation of the will of Lucy A. H. Deady set out in Issue No. 2b supra.

2e. Whether or not from the death of Lucy A. H. Deady in [84] August, 1923, up to the bringing of this suit in July, 1936, the plaintiff and the persons through whom he claims knew that the executors of the estate of Lucy A. H. Deady and the defendants herein considered and were acting upon the basis that Henderson Brooke Deady received under the will of Lucy A. H. Deady only a defeasible fee in Lot 1, Block 212, City of Portland, Oregon, together with the power of appointment given him in said will.

2f. Whether or not any claim was made by plaintiff or any person through whom he claims, that Henderson Brooke Deady received under said will any estate in said property other than a defeasible fee as set out in issue number 2b.

2g. Whether or not any such claim was made prior to the death of the attorney who prepared the will, the witnesses thereto, the executors named in said will and other persons having information and knowledge concerning, and who would be able to give and would give testimony to meet the issues raised by the amended complaint; also

Whether or not any such claim was made prior to the loss or destruction of any irreplaceable material documentary or other evidence bearing on said issues.

Issues of Law

1.* Whether or not Lucy A. H. Deady, by the language used in her will, intended to give Henderson Brooke Deady only a defeasible fee in Lot 1, Block 212, City of Portland, Oregon, subject to be defeated in favor of Hanover Deady and Matthew Edward Deady by Henderson Brook Deady's death under the circumstances under which it occurred.

2.* Whether or not the fact that the estate of Henderson Brooke Deady has not been closed and that no order has been entered therein taking the right to possession of or to the rents and profits from [85] Lot 1, Block 212, City of Portland, Oregon, from the executor of the Estate of Henderson Brooke Deady, bars this suit.

2a.* Whether or not Robert H. Strong, executor of the estate of Henderson Brooke Deady, deceased, is a necessary party to this suit.

3.* Whether or not this suit is barred by the Statute of Limitations.

4.* Whether or not this suit is the contest of the validity of a will within the meaning of Oregon Code 1930, Sec. 11-207, and if so, whether or not this suit is barred by said statute.

*By the inclusion of this issue and subsequent preliminary issues of law (issues numbered 1-4 inclusive), in the pretrial order, plaintiff does not waive his right to claim that the law of the case including this issue of law has been determined by the court's ruling on the motion to dismiss, and that this issue is not now properly before the court.

5. Whether or not by the last will and testament of Lucy A. H. Deady, deceased, Henderson Brooke Deady became vested in fee simple absolute in two-thirds of Lot Numbered 1, in Block numbered 212, City of Portland, Oregon.

6. Whether or not by virtue of any devise or bequest from Henderson Brooke Deady to Charlotte Howell Deady and any devise or bequest from Charlotte Howell Deady to the plaintiff herein, said plaintiff is now the owner in fee simple of said two-thirds interest in Lot numbered 1, in Block numbered 212 of the City of Portland, Oregon.

7. Whether or not paragraph seventh of the last will and testament of Lucy A. H. Deady provided for the contingency of the death of Henderson Brooke Deady only prior to the death of the testatrix.

8. If paragraph seventh of said last will and testament did not provide only for the contingency of the death of Henderson Brooke Deady prior to the death of Lucy A. H. Deady, then whether or not such provision was invalid and void under the rule against perpetuities.

9. Whether or not plaintiff is estopped from asserting any right to or interest in said Lot 1, Block 212, City of Portland.

10. Whether or not plaintiff is barred by laches from asserting in this suit any right to or interest in said Lot 1, Block 212, City of Portland.

11. Whether or not the plaintiff is the true owner in fee simple [86] absolute of an undivided

two-thirds of Lot 1, Block 212, City of Portland, and is immediately entitled to the joint control, management and operation thereof with the defendants Matthew Edward Deady and Hanover Deady, and to two-thirds of the income therefrom less such testamentary charges and legacies as the court may find to exist at the date of its decree.

12. Whether or not the defendant, The First National Bank of Portland, is without lawful or any right to manage, operate or control or to interfere with the management, operation or control of said real property, or to collect and receive or disburse any of the income therefrom, as trustee or in any other capacity whatsoever.

13. Whether or not the limitations on the power and disposition of said real property as contained in clause Sixth of said will are invalid and of no force and effect.

14. Whether or not the direction for the accumulation of a sinking fund from the income of the property for the payment of the mortgage contained in said last will and testament of Lucy A. H. Deady is invalid and void under the rule as to perpetuities.

15. Whether or not paragraphs fifth, sixth, eighth and ninth of said last will and testament are invalid and void.

16. Whether or not plaintiff has a plain, speedy and adequate remedy at law.

17. Whether or not the court should:

(a) Order, direct and decree a full and complete discovery of the facts referred to herein and

requiring defendants and each of them to render herein a true and correct accounting of all moneys which they or either of them have received as income from the said Lot 1, Block 212, City of Portland, since the decease of Charlotte Howell Deady, being the 12th day of July, 1935.

(b) Award to this plaintiff judgment against the defendants, and each of them, or any of them, for two-thirds of the income from said real property, since the said 12th day of July, 1935, less proper [87] deductions for payment of indebtedness, taxes, legacies, expenses of administration and other costs which, after the accounting is had herein, may appear to the court to be just and proper charges to be deducted from plaintiff's share of said income.

(c) Appoint a receiver to assume the management, operation and control of said real property and to collect and receive and hold the rents, profits and income from said real property, subject to the orders and supervision of this court pending the accounting and final disposition of the cause, or as the alternative, impound in the hands of the defendant, The First National Bank, all moneys derived from said real property, or which might be derived from said real property, or which might be derived therefrom during the pendency of this cause and prior to said accounting and restrain and enjoin the defendant, The First National Bank, from paying out or disbursing any of said money except as may be specifically ordered by the court or stipulated and consented to by the plaintiff.

The facts, contentions and issues having been determined, the foregoing is hereby made and entered as the pretrial order in this suit and the case is set for trial on the 21 day of January, 1941.

Done and dated this 23d day of December, 1940.

JAMES ALGER FEE

Judge

Approved:

DONALD K. GRANT

Of Attorneys for Plaintiff

EDGAR FREED,

NICHOLAS JAUREGUY

Of Attorneys for Defendants

[Endorsed]: Filed December 23, 1940. G. H. Marsh, Clerk. [88]

And afterwards, to wit, on the 21st day of May, 1941, there was duly filed in said Court, an Opinion on Admission of Evidence, in words and figures as follows, to wit: [89]

[Title of District Court and Cause.]

MEMORANDUM ON ADMISSION OF EVIDENCE

May 19, 1941

Some confusion has arisen in the minds of counsel over the interpretation of the will by the court, in the opinion on motion to dismiss. A rechrystallization of the decision may, therefore, be of moment.

The court held, taking the will by its four corners,

that the clear intention of the testatrix was, first to give two thirds of the real property in fee simple to her son, Henderson Brooke Deady and one third jointly, by like title, to her grandsons, Hanover and Mathew Edward Deady; and second, to control the disposition of the income from the whole property for a period of at least twenty-five years. In the third place, based upon these clear objectives, the court found a desire to substitute Hanover and Mathew Edward Deady for Henderson Brooke Deady as fee devisees, upon death of the latter during her life time without children. In the fourth place, although the court found the will required construction in order to discover intent, no ambiguity latent or patent, with regard to the devolution of title, was discovered. These findings will now be reviewed in this order. [90]

As to the first point, the intent to give a fee simple to Henderson to two thirds of the real property was shown by many factors. He was her sole surviving, and apparently favorite son. Another parcel is given to him in fee simple. He is principle legatee, one of the residual legatees, and trustee and executor. His estate was incumbered expressly with the identical "conditions, provisions and charges" and only those, which incumbered the estates given the grandsons, which latter were admittedly in fee simple. It is further provided that after ten years, the division of the income shall "follow the title and ownership of said real property" and be distributed two thirds to Henderson

Brooke Deady and one third to the grandsons. The residuary estate is given two thirds to Henderson and one third to Hanover and Matthew.

Everyone admits the son received this portion of the property in fee, but defendants claim this title was defeasible. This clear intention to give him fee simple title was mirrored in the will, since the Oregon rule requires that when a fee simple is given in a prior clause, such title shall not be cut down by words of doubtful import in a subsequent clause.¹ [91]

The second clear purpose of the will was to prevent alienation of the property for twenty-five years and to keep the property intact to pay off the mortgage. Mrs. Deady, had, by her acumen, turned this realty into a paying piece of property and unquestionably wished it held intact and desired her devisees to deal with the income rather than with the title. These provisions would have violated the rule against perpetuities if devolution of the realty was based thereon. The cognate rule against prolonged restrictions on alienation was violated thereby.

Third, upon these clear objectives, the court found the words whereby, the grandsons claim to obtain a fee simple interest in the two thirds of the property given to Henderson Brooke were of doubtful import. To the lay mind these words might in-

1. *Irvine vs. Irvine* 69 Oregon 187, 190, *Imbrie vs. Hartrampf* 100 Oregon 589, 596.

dicare, if viewed without the context, that the fee was to pass any time Henderson died without issue. But the draughtsman was a lawyer, who must have been acquainted with the Oregon rule that a fee simple given in one clause can not be cut down without a clear cut expression in a subsequent clause. He must have also known that by the great weight of American authority the words used, imported a "substitutionary intent." The court gave full weight to the opinions of the Supreme Court of Oregon in construing similar wills. The court noted that the life of Henderson was not used as the time for devolution of the title. The intent not to make the expiration of the trust and shackle on alienation, the time of devolution was also noted. This period was beyond a life or lives in being plus twenty-one years and the period [92] of gestation, so that an executory devisee dependant thereon would have been void. Construed according to the canons, no other solution was possible but to find Henderson held fee simple title, if he outlived his mother. All through the opinion, the court refers to and follows the principle enunciated by the Oregon court and the statutes of the state that the intention of the testatrix gathered from the will as a whole, without strict regard for the canons of construction, was binding. Although an attempt was made to reconcile the finding with the canons and the Oregon cases, the court ultimately found the intention of Mrs. Deady was to give a fee simple title to two thirds of the real property to her sole

surviving son Henderson Brooke Deady, if he outlived her.

Finally, nowhere in the opinion of this court is it indicated that the will contains ambiguities, either patent or latent, regarding title to the real property, although it is noted that if the draughtsman had made the gift to Henderson, dependent not only upon the "conditions, provisions and charges" as was the gift to the grandsons, but had added "and subject also to the executory devise", a different result might have followed. Clarity of interpretation might also have resulted from an addition to the words of the Seventh Clause of the Will as follows: "Seventh, That in the event my son Henderson Brooke Deady die without issue during my lifetime," then to the grandsons. There was a problem of construction, but no ambiguity so far as the devolution of the real property is concerned. [93]

The will is before the court. The general rule is that explanation, remarks or declarations of intention by the testator will not be received to explain, modify or vary the construction of a testament.¹ The formalities surrounding the execution of a will could be thus entirely destroyed.

There is nothing in the Oregon cases in contravention of that rule. In *Stubbs vs. Abel*, 114 Oregon

1. *Hansen vs. Oregon Humane Society* 142 Oregon 104, 118. *Re Estate of Hodgins* 110 Oregon 381. *Closset vs. Burtchael* 112 Oregon 585. *Stubbs vs. Abel* 114 Oregon 610. *Soules vs. Silver* 118 Oregon 96.

610, 621, the court construed the will in the light of the surrounding circumstances but did not specifically pass upon declarations of a testator. In *Schramm vs. Burkhart* 137 Oregon 208, 212-3, the court did give weight to oral declarations to prove a contract upon which joint and mutual wills between husband and wife were based. But this is an entirely different doctrine and has nothing to do with the interpretation of wills not so based. See OCSA § 2-206 *Holman vs. Lutz* 132 Oregon 185. In *Crown Company vs. Cohn* 88 Oregon 642, 652 the court found a latent ambiguity and used expressions of the trustor and testimony of the surrounding circumstances to clear the matter up.

Since the court here held that there was a clear purpose to give a fee simple title to Henderson on the face of the will none of these authorities are opposed to the construction placed upon the will. [94]

The oral expressions of Lucy A. H. Deady are rejected. The problem of construing wills is to find the intention of the testator by a consideration of the language used. Certainly, if there be doubt about identification of an article or person, testimony can be adduced to show this feature.¹ At times, also certain surrounding circumstances may be shown. But the very purpose of requiring formalities in the promulgation of a testament is to prevent the use of loose expressions of the testator to found

1. *Soules vs. Silver*, *supra*.

property rights. The scientific language used by lawyers is a guard against this very thing. Unless it be assumed that the lawyer was incompetent, such expressions must be taken to import the intention supported by the great weight of authority and to express the desire of the testator. Furthermore, dispositions which violate the legal limitations can not be assumed to have been intended by the lawyer, although a vague desire of the testator may have pointed in that direction. There is no ambiguity in the words "die without issue" even though different courts have fixed different periods to give the words effect. If oral declarations of a testator could be used here, such expressions can be used any time a problem of construction of a will arises, which is not the case.²

Lucy A. H. Deady did not know and could not have forecast the situation with which the court is now confronted. The court certainly is not required, nor even permitted to find the intention she would have if she were writing her will today. If she had given Henderson title to two thirds of [95] this real property outright and he had sold it to a

2. "Since the nature or extent of the estate or interest devised is determined by the legal effect of the language of the will, this question must be determined by the process of construction according to established legal principles, and evidence of the testator's declaration of intention is not admissible to show the character or quantum of estate intended to be devised." Note 94 A. L. R. 269, and cases there cited.

stranger, it would not have been thought inequitable. The mere fact that the son observed a restraint on alienation and the title has come into the hands of a stranger to her family should not warp the judgment. The situation must be judged, as she viewed it at the time.

Inasmuch as there is a possibility that the court might be required to admit this evidence under Rule 43 (a), it will be viewed as if admitted in order to determine relevancy. It is entirely consistent with the interpretation of the language of the will. Mrs. Deady said she was going to give the property to Henderson "because he was her son and she thought it was only fair and right to put it that way in the will". It is true that Hanover reporting this speech twenty years later couples the gift with the words "if he had children". If that slight change had been made in the will and these two clauses had been so wedded, a different result might have been reached. But Hanover is vitally interested and conceding utmost good faith, his recollection may have distorted these conversations. It is very significant that Mrs. Deady, at such times, declared that she knew Henderson could have no children and that she hoped Amalie would not give him a divorce and that he was a sick man. Even in the form in which these expressions come to the court, through the veil of time and the recollection of a witness, there is a suggestion that Mrs. Deady believed Henderson might die during her lifetime and without issue. The statements that the prop-

erty would come to Hanover and Matthew [96] someday might have been so conditioned. It is certain that she was impelled by a desire to have the property kept intact as a monument to Judge Deady, which is one of the clear expressions of the will. The other is, that however much she disapproved of her son's course of action, she thought it was "only fair and right" to give him a major share in the property. The addenda "if he had children" may have been coupled with the forgotten expression "during my life". She did unquestionably express affection for her grandson and regard for their welfare but this might as well have been fulfilled by a gift of one third of the property as, of the whole.

The next question is whether acts and agreements by the parties done after the death of the testator are admissible. The written stipulations of the parties, and papers filed in courts have some relevancy to the interpretation of the instrument placed thereon by the parties themselves. In *Stubbs vs. Abel*, *supra* the court admitted and considered a petition filed by one of the beneficiaries of a trust, wherein he placed a construction upon his interest. The court sounded a warning to the effect that such interpretations were not binding on the court. The question here is admissibility and not weight. The court therefore generally considers these documents admissible.

The matters relating to a claim presented by the State Treasurer for inheritance tax are rejected

for the reason that there was only one claim advanced by the State [97] and liability upon this was admitted by the estate. What relevancy this might have is inconceivable. The State Treasurer raised only the question of the tax due from the estate upon the income paid to Charlotte. The interests of all connected with the estate were the same. No one wanted to pay any more tax than the law required. The State will not be foreclosed from collecting what the law allows.

The inventory and appraisement of the estate of Henderson is also rejected together with the petition for the appointment of an administrator. The only possible relation these documents could have to the situation is to show how someone else may have construed the will. But the administrator may have believed he had no duty in relation to this real property since he could not get possession under Mrs. Deady's will. Whatever he thought or did is immaterial and irrelevant.

Oral declarations of Henderson are admitted. This may be justified either on the theory that plaintiff derives whatever title to real property which he may have from Henderson and therefore any declaration of Henderson's while holding the title is evidence against plaintiff (O. C. L. A. 2-206) or on the theory that such declarations may form a foundation for estoppel against Henderson and therefore against plaintiff, or possibly on other grounds. See O. C. L. A. 2-210 and 2-208. However, the expressions of Henderson are not admitted upon

the ground that there is patent or latent ambiguity in the will, nor as an aid to construction thereof. [98]

However, conversations with other people besides Henderson are not admissible. Nor is the understanding or construction of any other person admissible upon that ground alone. In using these conversations the court will give them but slight weight when not incorporated in a written document which is under discussion at the time, and give them no weight when in contradiction thereof. But the question now is that of admissibility.

The court admits the statement of Hanover that he relied upon representations of Henderson but reserves the right to weigh the testimony with the circumstances and in the light of the general situation.

A tabulation of the rulings is attached hereto and an appropriate order may be drawn incorporating the substance thereof. [99]

The court adheres to its previous ruling and excludes Defendants Pre-trial Exhibit (a) (certified photostatic copy of Petition for Probate of the will of Henderson Brooke Deady) p. 65.

The court adheres to its previous ruling and excludes Exhibit (b) (certified copy of Inventory and Appraisement of the Estate of Henderson Brooke Deady) p. 66.

The court adheres to its previous ruling excluding testimony as to the background of the subject

matter of conversations between Henderson Brooke Deady and Samuel B. Weinstein, p. 69-70.

The court sustains the objection to testimony of Samuel B. Weinstein regarding conversations with Chester Dolph as to what Henderson Brooke Deady was to receive under the will of Lucy A. H. Deady, p. 72.

The court admits in evidence Defendants Pre-trial Exhibit C (copy of complaint for divorce, with agreement attached thereto, in case of Henderson Brooke Deady v. Amalie B. Deady). p. 87.

The court admits testimony of Samuel B. Weinstein as to conversations with Henderson Brooke Deady. p. 75-81. p. 82.

The court excludes testimony of Samuel B. Weinstein as to whether he relied upon statements of Henderson Brooke Deady as to his interest in the real property in advising Amalie Deady to sign a property agreement in connection with Amalie's and Henderson's divorce, p. 85, p. 87. same ruling.

The court rejects testimony of Samuel B. Weinstein as to discrepancy between agreement and stipulation. p. 92. [100]

The court sustains plaintiff's motion to strike out all the testimony of Samuel B. Weinstein as to conversations and negotiations with Chester V. Dolph. p. 97-143.

The court admits testimony of Samuel B. Weinstein as to conversations and negotiations with Henderson Brooke Deady. p. 97-143.

The court admits testimony of Samuel B. Weinstein as to conversations and negotiations with Henderson Brooke Deady. p. 97-143.

The court admits testimony of Samuel B. Weinstein as to conversations and negotiations with Henderson Brooke Deady. p. 97-143. Defendant's Exhibit C is admitted, see *supra* p. 87.

The court sustains plaintiff's objection to Hanover Deady's testimony as to conversations with Lucy A. H. Deady regarding the property. p. 149, 150, 151, 152.

The court overrules plaintiff's objection to Hanover Deady's testimony as to conversations with Henderson Brooke Deady. p. 157.

The court overrules plaintiff's motion to strike Hanover Deady's testimony in regard to conversations with Henderson Brooke Deady relating to stipulations embodied in Defendant's Pre-trial Exhibits. I and J. p. 161.

The court overrules plaintiff's objection to Defendant's Pre-trial Exhibits I (certified photostatic copy of stipulation, Lucy A. H. Deady Estate dated December 18, 1923) and J (certified photostatic copy of stipulation, Lucy A. H. Deady Estate, dated October, 1924, and admits said exhibits in evidence. p. 161.

The court overrules plaintiff's objection to Hanover Deady's testimony as to controversy over real property as set out in stipulation. p. 163.

The court overrules plaintiff's objection on ground that question propounded by counsel was leading. p. 163. [101]

The court overrules plaintiff's objection to testimony of Hanover Deady regarding claim of Marye Thompson Deady. p. 164.

The court sustains plaintiff's objection to Hanover Deady's testimony regarding conversations had by Mary T. Deady with Mr. Simon and his mother (Mary E. Deady) and also sustains plaintiff's motion to strike such testimony. p. 165, 166.

The court overrules plaintiff's objection to Hanover Deady's testimony regarding conversations between Mary E. Deady and Henderson Brooke Deady in witness's presence. p. 167.

The court overrules plaintiff's objection and admits in evidence Defendant's Pre-trial Exhibit D (certified photostatic copy of amended complaint, Marye T. Deady vs. Henderson Brooke Deady, et al. p. 169).

The court overrules plaintiff's objection and admits in evidence Defendant's Pre-trial Exhibit E (photostatic copy of compromise agreement between Marye T. Deady, Henderson Brooke Deady, et al). p. 170.

The court overrules plaintiff's objection to testimony of Hanover Deady regarding conversations with Henderson Brooke Deady as to income from the property. p. 171.

The court overrules plaintiff's objection to testimony of Hanover Deady as to his reliance upon statements of Henderson Brooke Deady, p. 171.

The court overrules plaintiff's objection and admits in evidence Defendant's Pre-trial Exhibit A

(photostatic copy of affidavit of Henderson Brooke Deady, dated Oct. 29, 1925). p. 178.

The court overrules plaintiff's objection and admits in evidence Defendant's Pre-trial Exhibit K (certified photographic copy of stipulation, executed August, 1931, by Henderson Brooke Deady, Joseph Simon, et al.). p. 179. [102]

The court overrules plaintiff's objection and admits testimony of Hanover Deady with regard to Defendant's Pre-trial Exhibit K. p. 180, 187.

The court excludes testimony of Hanover Deady regarding negotiations with Joe Simon leading up to preparation of document which is Defendant's Pre-trial Exhibit K. p. 188-9.

The court excludes testimony of Hanover Deady regarding discussion with Ralph Wilbur. p. 193.

The court overrules plaintiff's stipulation to testimony of Hanover Deady regarding his reliance upon statement made by Henderson Brooke Deady, p. 194.

The court overrules plaintiff's objection to testimony of Hanover Deady regarding his signing of the stipulation (Ex. K.)

The court overrules plaintiff's objection and admits evidence Defendant's Pre-trial Exhibit G (copy of unexecuted agreement between Charlotte Howell Deady, Hanover Deady, and others, dated Oct. 22, 1934). p. 195.

The court adheres to its ruling in regard to the substitution of the original for the copy of Exhibit G p. 196. This matter is later cleared up by the introduction of the original.

The courts rulings on the letter of Wilbur, Beckett, Howell, and Oppenheimer to Joseph Simon, July 10, 1933, is made immaterial by subsequent action of counsel in withdrawing it. pp. 215, 227, 229-32, 238.

The court adheres to its previous ruling denying Plaintiff's motion to strike out testimony of Hanover Deady. p. 235.

The court adheres to its previous ruling overruling defendant's objection to question propounded to Hanover Deady on ground it had already been answered. p. 239. [103]

The court adheres to its previous ruling and admits testimony of Hanover Deady as to conversations with Robert Strong. p. 247.

The court adheres to its previous ruling admitting testimony of Hanover Deady regarding conversations with Joseph Simon. p. 248½.

The court adheres to its previous ruling denying plaintiff's motion to strike the testimony of Hanover Deady regarding conversation with Joseph Simon. p. 250-51.

The court adheres to its previous ruling admitting testimony of Jessie Murch as to whether or not she had conversations with Mrs. Lucy A. H. Deady. p. 256-7.

The court adheres to its previous ruling allowing Jessie Murch to answer counsel's question as to first time Mrs. Lucy A. H. Deady discussed matter with her. p. 257.

The court adheres to its previous ruling striking unresponsive answer of Jessie Murch. p. 257-58.

The court adheres to its previous ruling sustaining plaintiffs' objection to question asked Jessie Murch and testimony as to what Mrs. L. A. H. Deady said. p. 258-9.

The court sustains plaintiff's objection to Blanche Catlin's testimony regarding conversations with Mrs. Lucy A. H. Deady, p. 265.

The court adheres to its ruling refusing to strike answer of Blanche Catlin as being unresponsive. p. 268.

The court sustains plaintiff's objection to testimony of Ariel Deady regarding conversations with Mrs. Lucy A. H. Deady. p. 274.

The court overrules plaintiff's objection to testimony of Ariel Deady regarding conversations with Henderson Brooke Deady. p. 277-9. [104]

The court sustains plaintiff's objection to testimony of Mrs. Helen Hanson regarding conversations with Mrs. L. A. H. Deady. p. 282.

The court sustains plaintiff's objection to testimony of Matthew Deady regarding conversations with Mrs. Lucy A. H. Deady. p. 287.

The court grants plaintiff's motion to strike question and answer of Matthew Deady as to presents of Mrs. L. A. H. Deady. p. 288.

The court overrules plaintiff's objection to testimony of Matthew Deady regarding conversation of Mrs. L. A. H. Deady about Uncle Paul, the answer being no. p. 288-0

The court sustains plaintiff's objection to Matthew Deady's testimony regarding statements of Mrs. L. A. H. Deady about "When this property becomes your and Hanover's," etc. p. 290.

The court does not rule on plaintiff's objection to Matthew Deady's testimony regarding a letter from his brother because no ruling was requested and the line of testimony was abandoned. p. 292.

The court sustains plaintiff's objections and excludes from evidence Defendant's Pre-trial Exhibits:

F. (Copy of Order of Multnomah County Probate Court of April 21, 1924, determining state inheritance tax in Lucy A. H. Deady estate) p. 301.

L. (Copy of stipulation for settlement of inheritance tax in Lucy A. H. Deady estate, dated Sept., 1935.) p. 302-3.

M. (Copy of petition for determination of inheritance tax on Lucy A. H. Deady, estate, filed Oct. 1, 1935.) p. 304.

N. (Copy of Order fixing inheritance tax on Lucy A. H. Deady estate, dated Oct. 1, 1935. p. 304.

O. Copy of letter May 16, 1935, Oregon State Treasurer to First National Bank. p. 305. [105]

P. Copy of letter May 23, 1935, Robert F. Maguire to First National Bank. p. 305.

Q. Letter Oct. 25, 1923, Wilbur, Beckett, & Howell to Joseph Simon, p. 306-8.

R. Carbon copy of letter Oct. 26, 1923, Joseph Simon to Wilbur, Beckett and Howell. p. 308-9.

Note: It is understood that where the court has rejected testimony or excluded any documentary evidence, all cross-examination as to such testimony or document is also rejected.

[Endorsed]: Filed May 21, 1941. G. H. Marsh, Clerk, By R. DeMott, Deputy. [106]

And Afterwards, to wit, on the 17th day of November, 1941, there was duly filed in said Court, an Opinion in words and figures as follows, to wit:

[107]

[Title of District Court and Cause.]

OPINION

November 17, 1941

James Alger Fee, District Judge:

This case involves the construction of the will of Lucy A. H. Deady. The court, on motion to dismiss, interpreted the language of the will itself and sustained the complaint. Thereafter, answer was filed. A pre-trial conference was held. Based upon a pre-trial order, the case was tried before the court. Since numerous objections were made to the evidence, the court has heretofore issued an opinion dealing with questions of admissibility.

The facts are as follows:

At the time of the execution of her last will,¹

1. The will is printed in full in the former opinion of the court on a motion to dismiss, filed November 6, 1939.

Lucy A. H. Deady was 86 years of age, and at the date of her death, August 29, 1923, her age was 89 years. At the time of the execution of her will, and also at the time of her death, she had one living child, Henderson Brooke Deady, and two deceased children, Paul R. Deady and Edward N. Deady; three daughters-in-law, Amalie B. Deady (then the wife of Henderson Brooke Deady), Marye Thompson Deady [108] (widow of Paul R. Deady), and Mary E. Deady (widow of Edward N. Deady); two grandchildren, Matthew Edward Deady and Hanover Deady, children of Edward N. Deady. At the time of the execution of Lucy A. H. Deady's last will, Henderson Brooke Deady was 51 years of age, Matthew Edward Deady was 31 years of age, and Hanover Deady was 28 years of age. At that time Henderson was, and for a long time had been, living apart and separated from his wife, Amalie B. Deady.

At the time of her death Mrs. Deady was seized of the real property in question. Letters testamentary were issued to Henderson and Joseph Simon, September 15, 1923. Controversy seems to have sprung up immediately, concerning the distribution of money and the ownership of the property, between Henderson and Hanover. Wilbur, the attorney for Henderson and Matthew Edward wrote a letter to Joseph Simon, October 25, 1923, setting up a claim that the grandsons would be entitled to the whole estate on Henderson's death, and Joseph Simon answered October 26, 1923. The stipulation

settling a temporary schedule of disbursements was executed December 18, 1923. Marye Thompson Deady, thereafter, commenced suit September 3, 1924, claiming a portion of the real property, and as a result, apparently, a second stipulation was executed for temporary distribution in October, 1924. Thereafter, when considerable negotiation had been carried on between Henderson and Amalie B. Deady, a divorce suit was filed by the former and based upon a property settlement, dated September 14, 1925, decree entered therein. Marye Thompson Deady's suit was settled by the stipulation dated October 28, 1925, a document which clears the executors and [109] created a trust for the life of Marye Thompson Deady. Upon the day after, October 29, 1925, Henderson executed an affidavit to the effect that at that time he had no children. A great deal of negotiation was then carried on by Henderson and Hanover in the effort by Henderson to get consent to the payment of his share of the income to Charlotte Howell if he should die before the expiration of the six months after the date of his divorce decree from Amalie. The refusal of Hanover caused a violent quarrel. Henderson then left Portland and did not return. Shortly thereafter he married Charlotte Howell Deady. In 1931 another stipulation was signed as to distribution of the income by the executors.

Henderson died May 28, 1933, leaving no issue him surviving. He left a will which made no spe-

cific mention of this property, but named Charlotte Howell Deady as residuary legatee and appointed her to his share of the income of his mother's estate, in accordance with the provisions of his mother's will. Henderson's will was probated July 18, 1933. The estate has not yet been closed. Hanover was immediately interested in obtaining a definite expression as to how much money Charlotte Howell Deady would be entitled to under the appointment of Henderson. The result of this was that a compromise agreement was sent to her by Mr. Wilbur, which she refused to sign. Another document of settlement, both as to title and the income, was forwarded to her by Hanover's attorneys. This she signed October 11, 1934. On its return Matthew Edward signed but subsequently Hanover refused to execute it.

Joseph Simon died February 14, 1936, and The First National Bank was appointed and qualified as executor February 27, 1935. Charlotte Howell Deady died July 12, 1935. [110] Her will, probated July 22, 1935, makes no mention of this specific property, but designates Richard Howell, her son, as her residuary legatee. This estate is still unclosed.

The mortgage on the property in question was in the amount of \$40,000 at Mrs. Lucy A. H. Deady's death, and has been extended several times, and, on July 6, 1935, was still unpaid in the sum of \$29,000.

On March 6, 1935, the estate of Mrs. Lucy A. H. Deady was closed and The First National Bank

discharged as executor. Since then the defendants have held the property and denied any claim of the plaintiff thereto.

The court by construction of the will itself, exclusive of other factors, found that the intention of Mrs. Deady was to give to Henderson a fee simple title to an undivided two thirds interest in the real property in question, if Henderson survived her. This fee was encumbered with a restriction against alienation for twenty-five years and until the mortgage could be paid off and also, with the payment of certain definite sums to various persons.

The question of construction of the will by the parties involved is now raised upon the evidence.

Before discussing these issues, it should be noted that there appears inferentially in the record strong evidence of the correctness of the construction placed upon the will by the court.

Henderson, Paul R. and Edward N., sons of Judge and Mrs. Deady, by the will of their father, became at his death, jointly the owners in fee simple of the very real property here in issue, subject only to the life interest of Mrs. Deady. At her request, without consideration, the three sons deeded [111] the fee of this property to her, in order that the building could be erected thereon. This is undenied. Paul R. died without children, Marye Thompson Deady was given a monthly payment under the will, as his widow. Mrs. Lucy A. H. Deady recognized the obligation to Edward N. by giving to his sons, Hanover and Matthew Edward, one third of the real

property in fee subject to the "conditions, provisions and charges". It does not seem consistent to believe that she did not give an unqualified fee when she devised the balance of the property to Henderson, subject to the same "conditions, provisions and charges".

As noted above, Henderson had already held part of the property in fee and had deeded it to her. Unquestionably, she recognized this strong obligation and returned to him the fee which he had deeded to her, together with the interest of his deceased brother, but burdened with the cash payments and the restriction on alienation. This evidence almost conclusively sustains the construction. Because the gift in fee was in satisfaction also of a debt, the court in *Imbrie vs. Hartrampf*, 100 Oregon, 589, 597, says: "While the amount of the indebtedness is not disclosed by the record, it would not seem that the father in the liberal disposition of his bounty to his son, as manifested by the will, would devise a title in fee to land for a consideration in one part of the will and take it away or diminish the title, debase the fee as it is usually termed, in another part." Like considerations compel a like conclusion in the instant case.

But it is contended that either agreements or utterances of the devisees throw light upon the construction of the will.

There are three foundations upon which the court may consider occurrences after the death of Lucy A. H. Deady. First, if the family in written docu-

ments settled the [112] construction of the will or the clauses thereof or, second, if Henderson or Charlotte, as holder of the title in some binding manner placed limitation thereon, or, third, if either of them, when holding title, by false words or acts, misled Hanover and Matthew Edward to the point that it would be inequitable to allow a successor to set up the truth, then the construction of the will heretofore found by the court might be modified accordingly.

The court will consider as to the first ground four documents, signed by legatees and devisees under the will of Lucy A. H. Deady. The second basis will require a consideration of certain documents executed by Henderson and Charlotte Howell Deady. The third ground will require a consideration of the question of whether either Henderson or Charlotte was under a duty to speak or make representations, and what representations either of them made, whether Hanover or Matthew Edward relied thereon and whether damage was caused thereby.

There are four transactions in which the parties interested were involved: (1) the stipulation of December, 1923, (2) the stipulation of October, 1924, (3) the stipulation based on the claims of Marye Thompson Deady, dated October, 1925, (4) the stipulation of August, 1931.

The first stipulation of December 18, 1923, states that there is a dispute "as to whether or not the estate of said deceased shall be distributed as by said will directed and as to the ownership of the

real estate" in controversy here. This document was signed by all the interested parties. Hanover testified that the controversy then pending was the claim of Marye Thompson Deady to one [113] third of the real property in question. But the suggestion as to a stipulation regarding distribution of the income came, on October 26, 1923, from Ralph W. Wilbur, one of the attorneys for Hanover, and in the same letter there is the claim that the grandsons would ultimately come into the title of the whole tract, but no mention of the Marye Thompson Deady claim. Mr. Joseph Simon, the co-executor, in answer to this letter on October 28, 1923, agreed to the stipulation to protect the executors, but answers the claim as to the ultimate title by a suggestion that "all parties interested get together and arrive at some adjustment of their differences and avoid irritation and ill feeling".

It is extremely significant that Mr. Wilbur did not mention the claim of Marye Thompson Deady and that the dispute as to title was then between Henderson and the grandsons. The inference to be drawn is that Henderson, to the knowledge of Hanover and Wilbur, was claiming the fee, but this point was expressly left in abeyance by the document.

The stipulation of October, 1924, carried on the same agreements, except that Henderson, by the terms thereof, received \$100 per month additional. It is true this instrument bears evidence that Marye Thompson Deady was at that time urging her claim,

for in order to get her signature Henderson was required to pay to her \$10 per month out of the additional amount obtained by him. But, it will be noticed that her suit had been filed September 3, 1924, which is some indication that it was not being urged at the time of the first stipulation, executed almost a year before.

The primary purpose of the stipulation of October, 1924, was the settlement of the suit filed by Marye Thompson Deady [114] on September 3, 1924. The salient feature of the stipulation is that it is not and does not purport to be a construction of the will as to the shares acquired by Henderson and the grandsons, but was a new agreement among all the devisees in settlement of the claim made by Marye Thompson Deady that Lucy A. H. Deady had nothing but a life estate in the real property in question. However, the special warranty deed to be executed according to this stipulation is to be made by Marye Thompson Deady to Henderson and to each of the grandsons and not to trustees. This indicated that the title was in the devisees and not in trustees. Furthermore, the deeds are to be made "in proportion to their interests". If this is a construction of the will, the inference would be that Henderson was to get a deed to two-thirds and Matthew Edward and Hanover a deed to one-sixth each, respectively. If this is not the implication, then no claim can be based upon the stipulation except that the grandsons in the face of a dispute over the title did not have it explicitly settled. There

is certainly no implication here that Henderson was yielding to their construction.

The remaining stipulation of August, 1931, refers to the stipulations of December, 1923 and October, 1924, and re-distributes the income during the remainder of the ten year period set up in the will, but certainly has no implications as to construction of the will, or as to the disposition of the real property. It is notable that Marye Thompson Deady did not sign this stipulation, and that the agreement of October 18, 1925, is not mentioned therein.

If all of these "family" documents be considered, it is obvious that none had for its purpose the construction of [115] the will. The initial letters indicate the grandsons were claiming the whole property on Henderson's death. Yet nowhere in the documents is this question settled, nor is it ever mentioned again. Henderson was able to obtain the bulk of the income contrary to the terms of the will and defer the collection of a sinking fund contrary to the terms of the will, notwithstanding the claim advanced by Mr. Wilbur that the bulk of the income should be applied upon the mortgage sinking fund to protect the interest of the grandsons as ultimate devisees. Ably represented as the grandsons were, they would not have turned over the great bulk of the income to Henderson without a definite agreement that the grandsons would come into the property on Henderson's death. On the contrary, it is highly significant that the only document which directly deals with the title uses the

phrase "in proportion to their respective interests."

The most that can be said of this situation is that there was a deliberate failure to interpret the will after a sharp conflict had originally been suggested and at a time when Hanover contends no one had suggested a contrary construction.

The second basis for construction of the will consists of the acts and declarations of Henderson and Charlotte. This subject is further divided into written documents and oral expressions.

The written documents executed by Henderson which have bearing are: (a) the settlement with Amalie, his first wife, (b) the affidavit to the effect that he had no children, (c) his will.

The first document for consideration is the property settlement between Henderson and his first wife, Amalie. [116] This instrument contains only one expression which bears on the point. It is stipulated that Lucy A. H. Deady by will "did give, devise and bequeath to Henderson Brooke Deady the undivided two thirds of Lot numbered one * * * conditioned as in said will provided". It is possible that this expression might relate to the supposed executory devise. But it more probably relates to the words of the will that the devisees of Lot 1 "are upon the express condition that said property shall not be disposed of or encumbered during the period" of twenty-five years. All parties unquestionably accepted the restriction on alienation as valid. Since Henderson could not convey or encumber his in-

terest, the only way in which Amalie could get support was through the payment of money from Henderson directly while he lived, and by a share in the appointed annuity to his widow. In her situation, the freeing of the fee from restrictions at the end of twenty-five years could be of small interest. There are no implications to be drawn from this instrument that Henderson did not have fee simple title, subject to the restriction of alienation.

The affidavit executed by Henderson states that "no child or children have ever been born to me and that I have not had and have not now **any issue** by marriage or otherwise". This is a formal document filed in the estate. It was executed after the decree in the divorce case and after the final settlement with Marye Thompson Deady.

At that date if Henderson had died, Hanover and Matthew Edward would have been his heirs, if Henderson at the time of his death had **no children**, not by virtue of Mrs. Deady's will, but in accordance with the general laws of inheritance. [117] He had no other relatives and he believed he could not alienate his interest. Henderson, **further, was expectant** of death within a short time. This appears as a sufficient and, in fact, the only possible explanation of the document. If the construction of the will had been in issue, the document would have expressed this purpose and have contained apt terms to settle the controversy.

The instrument was intended also to clear Charlotte of the charge made by Hanover and is unquestionably connected with the quarrel mentioned later. Considering the time of execution, it cannot have been intended to convey any implication that Henderson did not have fee simple title.

There is no doubt that Henderson, through loyalty to the wishes of his mother or through belief in the legality of the provisions, bound himself so far as he could to the validity of the distribution of the income by the executors in accordance with the stipulations and in view of the restriction on alienation. He acted as if he had a personal belief that these were binding.

This belief is of interest, in interpreting his own will, the last instrument for consideration on this subdivision. He did appoint an income to Charlotte, as his widow. He believed that with the distribution prescribed by the will or the various stipulations and the restraint on alienation he could not provide for her in any other way. Otherwise, he would not have been so violently disturbed over Hanover's refusal to provide for Charlotte before their marriage.

The failure to devise his interest in Lot 1 to Charlotte expressly in his will, probably has the same explanation. He would expect the others to take advantage of breach of the [118] condition against alienation, especially if Charlotte were involved.

The written documents with which Charlotte was connected are next in order. These consist of: (a) the abortive stipulations and (b) her will.

(a) The first instrument relating to the interest of Charlotte was sent to her by Mr. Wilbur, the attorney for Hanover and Matthew Edward, after Henderson's death. There is dispute over the contents and it need not be further regarded.

The second was signed by Charlotte and Matthew Edward and by Mr. Wilbur, as witness, but not by Hanover and, therefore, did not become effective. This document can be construed in no other way than as a claim of a fee simple interest in the property on behalf of Charlotte with an offer to compromise for a life estate and an assured income. The "controversies" regarding "the nature and extent of their interests and estate in said real property" and the fact that "each has and does assert claims thereto adverse to the claims asserted by the other" are recited. Charlotte offers to deed to Hanover and Matthew Edward "all her right, title and interest in and to Lot numbered one" subject to the legacies "but there is saved, excepted and reserved to said Charlotte Howell Deady, for the term of her natural life, a life estate in an undivided two thirds interest in said real property and its appurtenances and in and to the rents, income and profits therefrom". The document contains also a confirmation of the life estate from the grandsons. This was clearly the assertion of a claim to the title in Char-

lotte. Equally clear is her acceptance [119] of distribution by the executors according to the stipulations and her acceptance of the restriction on alienation.

(b) Her will must be interpreted like that of Henderson. Apparently she, like Henderson, believed that a devise of the interest expressly would be in violation of the condition against alienation.

A thorough consideration of the written documents executed by the parties indicates that all accepted the management of the real property, the distribution of income by the executors and the validity of the restriction on alienation. No express statement in any document is made construing the language of clause seven of the will, notwithstanding the grandsons now urge that Henderson continually adopted the construction for which they now contend.

Next, the testimony of oral expressions by Henderson and Charlotte should be considered. It is extremely doubtful whether this testimony was admissible. In almost every instance the oral testimony was introduced to explain or contradict expressions in the series of written documents which have been considered, including the will. If Henderson accepted the interpretation of clause seven of the will as an executory devise to the grandsons on his death without issue, it would seem that this vital factor would appear in the documents.

It has been urged that Joseph Simon, Chester V. Dolph and Lester W. Humphries and Mary E. Deady are dead and cannot testify as to the representations made by Henderson. But the fact which is more ponderable is that this testimony now under consideration consists of oral declarations claimed to [120] have been made by Henderson, who is dead and cannot explain them.

Neither Henderson nor Charlotte were under any more duty to urge their interpretation of the will than were Hanover and Matthew Edward. Even if the latter were continually urging the proposition that Henderson did not have a fee simple, he and his successors would have a right to rely upon the terms of the will.

The danger and difficulty of re-interpreting written documents upon oral declarations made under various situations over a course of years is apparent.

However, several situations will be considered. The conversations with Weinstein over the settlement with Amalie are in explanation of a written document which is before the court and which does not by its language clearly convey an expression concerning the title. Clear and convincing proof of declarations which divest one of fee simple title must be required. If this was the key of the settlement it would logically appear in the document.

These declarations are furthermore related in general effect and not by specific conversation. How much of this understanding came by Weinstein's

own interpretation, or by vague impressions of someone else who may have read the will and how much was directly said by Henderson himself is problematical. Henderson and his then wife were dealing at arms length. Once she was divorced, Hanover and Matthew Edward would be the heirs of Henderson, unless he already had children and it is probable that the declarations related to this situation, since Hanover made that the point of discussion two months later when the affidavit, which has [121] already been discussed, was obtained. If the inalienability of the property for twenty-five years be assumed, as apparently Henderson assumed it, the settlement was fair and no further circumstantial guaranty of this fact is necessary. Charlotte, after her marriage to Henderson carried out these terms to the letter.

The salient point is that if such admissions were made none were reflected in the written property settlement between Henderson and Amalie.

The alleged declarations of Henderson to Hanover were spread over the period of time from the death of Lucy A. H. Deady on August 29, 1923, to the departure of Henderson for the East, sometime in November, 1925. So far as the testimony is specific as to the conversations, each occurred with reference to a situation which resulted in a document. The first was soon after Lucy A. H. Deady's death. These conversations could not have been as satisfactory to Hanover, since they were followed (1) by the letter of Mr. Wilbur of October 26,

1923, which criticizes the claims of Henderson and advances the interpretation of the will here urged by the grandsons, (2) by the letter of Joseph Simon of October 28, 1923, counselling an amicable arrangement, and (3) by the stipulation of December 18, 1923, which recites that there are controversies, and yields to Henderson a major portion of the income, contrary to the claim of the Wilbur letter that this should be applied to the sinking fund because the grandsons owned the ultimate title.

The declarations to Mary E. Deady are closely connected with the stipulation settling the Marye Thompson Deady claim and can be explained upon the basis that, at that time the [122] grandsons would have got the title in the event of Henderson's death, if he had no children then. The similar explanation of the conversations relating to the affidavit has already been made.

The conversations and quarrel regarding the refusal of Hanover to provide for Charlotte in the event Henderson died before he married her, show Henderson's attitude toward the condition against alienation. He was in fear of immediate death, but he was also afraid to marry Charlotte before the six months had expired, because it might be claimed she was not legally his widow. If he was not married at the time of his death, Hanover and Matthew Edward would have inherited his two-thirds unless he had children. He had sworn he had no children, probably as a preface to an attempt to

get Hanover to agree to provide for Charlotte, in the event he could not marry her before his death.

Charlotte has only one declaration reported and that by hearsay. It was to the effect that Charlotte "knew what Mrs. Deady wanted". These words may mean that Mrs. Deady wanted the estate kept intact and that Charlotte was not going to violate that wish herself. It certainly does not mean that she was advancing no claim to title, as the offer of settlement shows.

Summarizing, none of the written documents contain direct evidence that Henderson was not claiming a fee. The implications are all to the contrary. The oral declarations are vague and indirect and are generally in explanation or contradiction of one of the written documents. Finally, Henderson was under no more duty to place his claim of absolute title into the foreground than were Hanover and Matthew Edward to insist upon their interpretation. [123]

Hanover, moreover, places no reliance upon anything Henderson said or did. The aura of conflict between the two is perfectly apparent in reading the record. Hanover's attitude has been one of hostility to Henderson on account of disapproval of the alleged conduct of the latter. This hostility is untempered by any modifying factors toward Charlotte and plaintiff. It is apparent in the first letter of Mr. Wilbur soon after Mrs. Deady's death, in the refusal to make a compromise regarding support for Charlotte if Henderson died

before marriage, in the desire to cut her annuity as far as possible immediately after Henderson's death. Assuming entire honesty upon his part, it colors his testimony when he says that the stipulation of December 18, 1923, was based altogether upon the controversy relating to the interest of Marye Thompson Deady, when the previous correspondence shows that there was a clash of interest regarding the title between Henderson and himself. This led him also to deny that Charlotte made any claim to title when the document which was before him set up claim of title in her. If this stubborn and uncompromising moral attitude had not existed, he could have settled this dispute by a stroke of the pen. Mr. Wilbur could not have taken the same attitude, since he allowed Matthew Edward to sign the stipulation, put his own name to the document as a witness and thereafter held the document for months, in apparent hope that Hanover would sign it.

This same spirit apparently led Hanover to convince himself that Henderson and everyone else agreed with him on his peculiar interpretation of the will. It is credible that he has constantly believed that the title would come to him if Henderson had no children. But this may be [124] because he would believe no one who suggested a contrary interpretation or doubts as to the construction. In any event, there were many controversies over the income and he did not require Henderson in any

stipulation to specifically state that Hanover and Matthew Edward were to receive the two-thirds of Lot 1 on the former's death, notwithstanding that he yielded to the demands of Henderson for more income many times through the years.

Thus, none of the alleged constructions of the will have weight with the court. The court finds that two-thirds of Lot 1, Block 212, vested in Henderson at the death of his mother, passed to Charlotte and from her to plaintiff.

The next question is as to what relief plaintiff is presently entitled.

The court has heretofore construed the will and thereby found that there was no real testamentary trust since the fee title was vested in the grandsons and Henderson. The executors were simply given the right to collect and distribute the income, pay the specific legacies and create a sinking fund. The power to renew the mortgage is given to the fee owners and the restriction against alienation is placed directly against them, not against the executors.

The question of subsequent construction does affect this clause of the will. Joseph Simon and Henderson did not close the estate and claimed only to act as "executors". Joseph Simon did not close the estate after Henderson's death nor during the remaining period of his own life and claimed to be acting as surviving executor. In each of the stipulations Joseph Simon and Henderson are described

as "executors". They never pretend to act as trustees. In [125] each stipulation a complete validation of the previous acts and payments made by the "executors" is required. These circumstances clearly indicate a serious doubt as to the validity of the clauses of the will, which it now is contended create a trust.

When The First National Bank closed the estate as executors, it was not, therefore, vested with any rights as a trustee, under the will or otherwise. The land was charged with the payment of specific sums of money and these would have to be paid by the holders of the fee, insofar as valid.

There was, however, a trust created by the stipulation of October 28, 1925, Joseph Simon and Henderson received the real property during the life of Marye Thompson Deady with the duty to pay the specified sums and to create a sinking fund. Since plaintiff is not therein mentioned he cannot be considered as entitled to share in any present income from the property. However, he is presently entitled to an accounting from the trustee who may be appointed to succeed the original trustee under this stipulation. The First National Bank is not a successor, but wrongfully exercises control over the estate. But by virtue of its possession, it holds the property subject to the obligations of a trustee by virtue of its own wrongful seizure. Plaintiff is then entitled to an accounting as against the bank.

Findings and judgment will enter in accordance with this opinion.

[Endorsed]: Filed November 17, 1941. G. H. Marsh, Clerk. By R. DeMott, Deputy. [126]

And afterwards, to wit, on Tuesday, the 24th day of February, 1942, the same being the 42nd Judicial day of the Regular November, 1941, Term of said Court; present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [127]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This suit came on regularly for trial before the Honorable James Alger Fee, Judge presiding, plaintiff appeared by Robert F. Maguire and Donald K. Grant of his attorneys; defendant First National Bank of Portland appeared by Edgar Freed and Nicholas Jaureguay of its attorneys, and defendants Matthew Edward Deady and Hanover Deady appeared personally and by said last named attorneys. Whereupon evidence was adduced by the respective parties, the parties rested, and the case was submitted to the court; and the court being advised in the premises makes the following:

Findings of Fact

I.

That plaintiff is a citizen and resident of the State of Connecticut and is one and the same person as Richard Howell Busck, a son of Charlotte Howell Deady, who is named in the last will and testament of the said Charlotte Howell Deady as her sole legatee and devisee, all of which more fully appears from the last will and testament of the said Charlotte Howell Deady hereinafter set out.

II.

That the defendants, Matthew Edward Deady and Hanover Deady, are citizens and residents of the State of Oregon.

III.

That the defendant, the First National Bank of Portland, [128] is a national banking association organized and existing under the national banking laws of the United States of America with its office and principal place of business in the City of Portland, State of Oregon.

IV.

That the controversy herein involves money and property rights exclusive of interest and costs of a value in excess of \$3,000.00.

V.

That on and before the 29th day of August, 1923, the said Lucy A. H. Deady was seized in fee

of the following described real property located and situated in the City of Portland, County of Multnomah, State of Oregon, towit:

Lot One (1), Block Two Hundred and Twelve (212) City of Portland, together with the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining.

That on or about said date said Lucy A. H. Deady died leaving a last will and testament which was duly and regularly proved and admitted to probate in the Circuit Court of the State of Oregon for Multnomah County, Probate Department, on the 5th day of September, 1923; that letters testamentary issued out of said court on the 15th of September, 1923, to Joseph Simon and Henderson Brooke Deady, as executors of the last will and testament of said Lucy A. H. Deady, deceased; administration of the estate of said deceased was had thereunder and said estate was closed and the then executor thereof, to-wit, The First National Bank of Portland, was discharged on March 16, 1936. Said last will and testament was in words and figures substantially as follows:

In The Name of God, Amen: I, Lucy A. H. Deady, of Portland, Oregon, widow of the late Matthew P. Deady, make this the following my Last Will and Testament, that is to say:

First: I will and direct that all my just debts and funeral expenses be paid. [129]

Second: I request and direct that my body be interred by the side of my late husband, Mathew P. Deady, in Riverview Cemetery.

Third: Subject to the conditions, provisions and charges thereon hereinafter made, I give, devise and bequeath to my son Henderson Brooke Deady, the undivided two thirds of Lot numbered One (1) in Block numbered Two Hundred and Twelve (212) of the City of Portland, Oregon.

Fourth: Subject to like conditions, provisions and charges thereon, I give, devise and bequeath to my two grandsons, Matthew Edward Deady and Hanover Deady, the remaining undivided one-third of said Lot 1, Block 212, Portland, Oregon.

Fifth: I direct that from the income derived from said Lot numbered 1 in Block numbered 212, there be paid to Mary E. Deady, widow of my deceased son, Edward Nesbith Deady, the sum of \$150.00 per month during the term of her natural life, and that there be paid to Marye Thompson Deady, who was the wife of my son Paul R. Deady, the sum of \$75.00 per month, so long as she survives and remains unmarried.

I further direct that the remainder of the income derived from the real property, shall be distributed as follows:

(a) To the payment of each of my grandsons,—Matthew Edward Deady and Hanover

Deady, the sum of \$100.00 per month, and the remainder of said income shall be paid to my son, Henderson Brooke Deady. Such division of the income derived from the said real property to continue during the lifetime of my son, Henderson Brooke Deady.

Provided further, that from the income derived from said real property, and before the distribution of the same, there shall be paid therefrom, the inheritance tax properly chargeable against my estate, or the legacies or divisions made, and after the payment of such inheritance tax, there shall be created a sinking fund of not less than \$1000.00, nor more than \$2500.00, per year in discretion of my executors, for the purpose of retiring and paying off the mortgage debt created and existing against said Lot numbered 1, Block numbered 212,

Sixth: I will and direct that said Lot numbered One (1) in Block numbered two hundred and twelve (212), Portland, Oregon, shall neither be mortgaged, partitioned, sold, or otherwise encumbered by my devisees, except for the improvement of the same, until the expiration of twenty-five (25) years from the date of my decease, and the devises to my said son Henderson Brooke Deady, and to my grandsons, Matthew Edward Deady and Hanover Deady, contained in items three and four hereof, are upon the express condition that said

property shall not be disposed of or encumbered during the period aforesaid, provided, however, that said real property may be encumbered by mortgage to renew the present mortgage, or such portion thereof as may from time to time remain unpaid.

Seventh: That in the event my son Henderson Brooke Deady die without issue, the undivided two-thirds of Lot [130] numbered 1 in Block numbered 212, shall vest in my grandsons hereinbefore named, and I give and devise the same to my said grandsons.

Eighth: I authorize and permit my son Henderson Brooke Deady, if he so elects to do, to bequeath by last Will and Testament to his wife, (if he then has a wife,) the income that would have been derived by him if living, from the two-thirds of Lot 1, Block 212, City of Portland. Such bequest to continue only during the life time of the widow of said Henderson Brooke Deady.

Ninth: The monthly payments directed to be made to my grandsons, and the residue of income directed to be paid to my son Henderson Brooke Deady, provided for in Item Fifth of this will, shall continue for a period of ten years after my death, and thereupon and thereafter the net income derived from said Lot 1 in Block 212 of the City of Portland, shall follow the title and ownership of said real property, and shall be distributed, two-thirds

to my son Henderson Brooke Deady, and the remaining one-third to my two grandsons, subject to the payment of the legacies bequeathed to Mary E. Deady and Marye Thompson Deady, in said Fifth item specified. It is my wish that my executors provide out of the residue of the income bequeathed to my son, Henderson Brooke Deady, in Item Fifth, funds at their discretion, to further any legitimate or worthy ambition or aim, other than business ventures, which my grandsons Matthew Paul and Hanover or either of them, may undertake or entertain.

Tenth: I give, devise and bequeath to my son Henderson Brooke Deady, that certain parcel of real estate situated and being in Mountain View Park heretofore conveyed to me by my son Edward Nesmith Deady.

Eleventh: I give and bequeath to my grandson Hanover Deady my law library.

Twelfth: All the rest, residue and remainder of the property of which I shall be seized, of whatever nature and wheresoever situated, I give, devise and bequeath to my son Henderson Brooke Deady and to my grandsons Matthew Edward Deady and Hanover Deady; to Henderson Brooke Deady the undivided two thirds thereof, and to Matthew Edward Deady the undivided one-sixth thereof, and to Hanover Deady the remaining undivided one-sixth thereof.

Lastly: I hereby nominate and appoint my son Henderson Brooke Deady, and my friend Joseph Simon, of Portland, Oregon, to be the executors of this my last Will and Testament, and also Trustees to manage my estate, and I direct that no bond or security shall be required of them as such Executors or Trustees. I also direct that in the event of the death, resignation or disqualification of all of my said Executors, and Trustees named herein, the Security Savings and Trust Company, of Portland, Oregon, shall then complete the execution of said Estate, and serve as Trustee thereof.

I hereby revoke all former Wills by me at any time made.

In witness whereof, I have hereunto set my hand and [131] seal this 29th day of July, A. D. 1920, at Portland, Oregon.

(Signed) LUCY A. H. DEADY (Seal)

The above instrument of writing was signed by Lucy A. H. Deady, the Testatrix therein named, in the presence of us, who at her request and in her presence, and in the presence of each other, have subscribed our names as witnesses thereto.

(Signed) CHESTER V. DOLPH

Residing at Portland, Or.

(Signed) J. V. BEACH

Residing at Portland, Or.

VI.

That the said Henderson Brooke Deady died without issue on or about the 28th day of May, 1933, leaving a last will and testament wherein and whereby he devised and bequeathed all of his property, real and personal, to his wife, Charlotte Howell Deady; that said last will and testament was, on the 18th day of July, 1933, duly and regularly proved and admitted to probate in the Circuit Court of Multnomah County, State of Oregon, Department of Probate, and administration of said estate commenced thereunder by letters dated July 8, 1933, appointing Robert H. Strong as executor thereof, who thereafter and on the 18th day of July, 1933, duly qualified and became and ever since said date has been and now is such executor. Said last Will and Testament of Henderson Brooke Deady was in words and figures substantially as follows:

I, Henderson Brooke Deady, of the City of Portland, State of Oregon, being of sound and disposing mind and memory, do make, publish and declare the following to be my Last Will and Testament, hereby revoking all other and former wills by me at any time made.

First: I nominate and appoint Robert H. Strong of the City of Portland, State of Oregon, sole executor of this, my Last Will and Testament, and direct that no bond of any sort shall be required of him.

Second: I give, devise and bequeath unto my beloved wife, Charlotte Howell Deady, all my property, real and personal, of every name, nature and kind, wheresoever the same may be situated.

Third: Under Paragraph 8 of the Last Will and Testament of my beloved mother, Lucy A. H. Deady, executed the 29th day of July, 1920, I am authorized and permitted to bequeath by my last Will and Testament to my wife, the income which would be derived by me, if living, from two-thirds of Lot 1, Block 212, City of Portland, State of Oregon, for and during [132] the term of her natural life. I now, under and by virtue of said paragraph 8 of my said beloved mother's will, bequeath said income from said two-thirds of Lot 1, Block 212, City of Portland, State of Oregon, to my beloved wife, Charlotte Howell Deady, for and during the term of her natural life, and nominate and constitute her my appointee under said paragraph 8 of the said will of Lucy A. H. Deady.

In witness whereof, I have hereunto set my hand and seal this 22nd day of October, 1932.

HENDERSON BROOKE DEADY (Seal)

The above and foregoing was duly signed, sealed, published and declared by the said Henderson Brooke Deady to be his Last Will and Testament, in our presence, and we and each of

us in his presence and in the presence of each other and at his request signed our names as witnesses thereto on the date therein named and the said Henderson Brooke Deady was at said time, in our opinion, of sound and disposing mind and memory and free from restraint of any sort.

Names	Addresses
RALPH C. DODD	New Milford, Conn.
JOHN S. ADDIS	New Milford, Conn.

VII.

That the said Charlotte Howell Deady died on or about the 12th day of July, 1935, leaving a last will and testament; that on the 22nd day of July, 1935, said last will and testament of the said Charlotte Howell Deady was duly and regularly proved and admitted to probate in the State of Connecticut and that on said date the plaintiff herein was appointed and qualified as and ever since said date has been and now is executor of the last will and testament of the said Charlotte Howell Deady. The last Will and Testament of Charlotte Howell Deady was in words and figures substantially as follows:

I, Charlotte Howell Deady, of New Milford, Connecticut, do hereby make, publish and declare this to be my Last Will and Testament, hereby revoking all other and former wills by me made.

First: I do hereby order and direct that all of my just debts and funeral expenses be paid

out of my estate as soon after my decease as possible.

Second: I give, devise and bequeath unto my beloved husband, Dr. Henderson Brooke Deady, all my estate, real, personal and mixed, where-soever situated, absolutely and forever. [133]

Third: If my beloved husband, Dr. Henderson Brooke Deady, should predecease me, I give, devise and bequeath unto my son, Richard Howell Busck, also known as Richard Howell, my farm in New Milford, Connecticut, consisting of house, barn and approximately sixty acres (60) of land, and all the contents and furnishings of said house and machinery and apparatus and stock and poultry on said farm.

Fourth: In case my beloved husband, Dr. Henderson Brooke Deady, should predecease me, I further give, devise and bequeath unto my beloved son, Richard Howell Busck, also known as Richard Howell, all my other property, real, personal and mixed, wheresoever situated and of any kind or nature whatsoever, including all money which I may have in any bank or banks at the time of my decease, also all notes, bonds, and stocks, and bonds and mortgages owned by me at the time of my decease, and all debts which may be owing to me at said time.

Fifth: I make no provision for my daughter, Karen Busck, in this, my Last Will and Testa-

ment, because she has arrived at her majority and has received her education and is self supporting.

Sixth: I nominate, constitute and appoint Dr. Henderson Brooke Deady to be executor of this, my Last Will and Testament; if my said beloved husband, Dr. Henderson Brooke Deady, should predecease me, I nominate, constitute and appoint my beloved son, Richard Howell Busck, also known as Richard Howell, to be executor of my Last Will and Testament, and direct that no bond or other security be required of either of them for the faithful performance of their duties.

In witness whereof I have hereunto set my hand and seal this fourth day of May, in the year One Thousand Nine Hundred and Thirty-three.

CHARLOTTE HOWELL DEADY (Seal)

Witnessed by:

JOHN M. SCOBLE

MARIVA INGLING

N. COURTENAY JOHNSTON

The foregoing instrument was subscribed, sealed, published and declared by Charlotte Howell Deady, the testatrix above named, as and for her Last Will and Testament, in the presence of each of us, who, at her request, in her presence and in the presence of each other,

have hereunto subscribed our names as witnesses the day and year above written.

MARIVA INGLING

residing at 259 Edward St.

Ridgewood, N. J.

K. COURTENAY JOHNSTON

residing at 461 West 22 Street

City of New York

JOHN M. SCOBLE

residing at 988 Lincoln Place

Brooklyn, N. Y.

VIII.

That there exists between the plaintiff and defendants [134] herein an actual bona fide and justiciable controversy within the meaning of the provisions of Title 28 U.S.C.A., Sec. 400, which said controversy involves in part the construction and legal interpretation of the said last will and testament of the said Lucy A. H. Deady and depends for its determination upon a judicial declaration of the legal rights of this plaintiff thereunder.

IX.

That Charlotte Howell Deady during her lifetime made no conveyance of any title to said real property or any interest therein.

X.

That the clear intention of Lucy A. H. Deady, deceased, (hereinafter referred to as the testatrix)

was by her will to devise an undivided two-thirds ($\frac{2}{3}$) of Lot numbered one (1) in Block numbered Two Hundred Twelve (212) of the City of Portland, Oregon, (hereinafter referred to as "said property"), to her son Henderson Brooke Deady in fee simple, and to devise an undivided one-third of said property by like title to her two grandsons, Hanover Deady and Matthew Edward Deady.

XI.

That the clear intention of Lucy A. H. Deady was by her will to subject said two devises to like conditions, provisions and charges by which the testatrix attempted to control the disposition of the income from the whole property and to prevent its alienation or encumbrance for a period of at least 25 years from her death.

XII.

That the testatrix intended by paragraph Seventh of her will to substitute Hanover Deady and Matthew Edward Deady for Henderson Brooke Deady as devisees of said two-thirds ($\frac{2}{3}$) interest in fee in said property in the event of the death of Henderson Brooke [135] Deady during her lifetime without children, but this paragraph of the will was not intended by the testatrix to defeat, cut down or limit the fee given to Henderson Brooke Deady if he outlived her.

XIII.

That upon the death of Henderson Brooke Deady, his full estate in fee simple in two-thirds of said

property passed by testamentary devise to his widow, Charlotte Howell Deady, and upon her death all her full estate in fee in said undivided two-thirds of said property passed by testamentary devise to plaintiff.

XIV.

That at all times since the death of Charlotte Howell Deady plaintiff has retained full interest in and ownership of said undivided two-thirds ($\frac{2}{3}$) of Lot 1, Block 212, City of Portland, Oregon.

XV.

That neither plaintiff or his predecessors in interest ever agreed to any other or different construction of the will of Lucy A. H. Deady.

XVI.

Neither Henderson Brooke Deady or Charlotte Howell Deady, or plaintiff, have at any time construed the will of Lucy A. H. Deady to mean that Henderson Brooke Deady, upon the death of Lucy A. H. Deady, received only a defeasible fee in Lot One (1), Block Two Hundred Twelve (212) City of Portland, subject to be defeated by his death without issue.

XVII.

That Henderson Brooke Deady did not at any time represent to the defendants Hanover Deady or Matthew Deady that Lucy A. H. Deady by her said will intended to give the said Henderson Brooke

Deady only a defeasible fee in said real property which would be defeated in favor of Hanover Deady and Matthew Deady upon Henderson [136] Brooke Deady's death without issue, or that he, the said Henderson Brooke Deady, under said will received such a defeasible fee in said property or that upon his death without issue his interest in the property would go to them subject to the power of appointment in favor of his wife, given in said will; nor did Hanover Deady or Matthew Deady act on any such representations to Henderson Brooke Deady's benefit or their detriment.

XXIII.

That Henderson Brooke Deady did not at any time acquiesce in the interpretation of the will of Lucy A. H. Deady that he received only a defeasible fee in said property, nor did he elect to accept said interest, nor did he waive any other interest therein.

XIX.

That the executors of the estate of Henderson Brooke Deady did not accept or acquiesce in the interpretation of the will of Lucy A. H. Deady that Henderson Brooke Deady was devised only a defeasible fee in said property.

XX.

That plaintiff and his predecessors in interest have not been guilty of laches or undue delay in bringing this suit or in making a claim to be the

owners of an absolute fee simple estate in an undivided two-thirds ($\frac{2}{3}$) interest in said real property.

XXI.

That as early as October 26, 1923, Henderson Brooke Deady asserted that he was the owner of an absolute fee simple estate in an undivided two-thirds ($\frac{2}{3}$) interest in said property and the defendants Hanover Deady and Matthew Deady contended that he received only a defeasible fee that would be defeated upon his death without issue.

XXII.

That there has been no waiver by plaintiff or his predecessors in interest of any right to or interest in said property. [137]

That at no time did plaintiff or his predecessors in interest make any election to accept any lesser interest in said property than the undivided two-thirds ($\frac{2}{3}$) in fee simple to which they were entitled.

XXIII.

That Lucy A. H. Deady did not by her will intend to create nor provide for the creation of a trust after the probate of her estate should be completed, the estate closed and her executors discharged.

XXIV.

That on or about the 28th day of October, 1925, Henderson Brooke Deady, Matthew Edward Deady, Hanover Deady, Marye T. Deady and Mary E.

Deady entered into a contract which has been received in evidence as Exhibit E, and which contract is in words and figures substantially as follows:

Whereas Marye T. Deady has filed suit in the Circuit Court of the State of Oregon for Multnomah County against Henderson Brooke Deady, Mary E. Deady, Matthew Deady, Hanover Deady and Henderson Brooke Deady and Joseph Simon as executors of the estate of Lucy A. H. Deady, deceased, being Case No. K 8897, for the relief claimed in said suit, among other things for an undivided one-third interest in Lot one, Block two hundred twelve, in the City of Portland, County of Multnomah, State of Oregon, and

Whereas the undersigned, being all the beneficiaries and legatees under the will of Lucy A. H. Deady of said property, and being all of the persons interested in said property and in the income therefrom, have compromised and settled the controversies created by said suit, whereby said suit is to be dismissed without costs and with prejudice, now therefore

In consideration of the Premises, and of said settlement and dismissal of said suit, and of the execution of this agreement, it is agreed by the undersigned that from the income derived from said Lot 1, Block 212, there shall be paid to Marye T. Deady (she being the same person named as Marye Thompson Deady in the will of Lucy A. H. Deady) during the term

of her natural life and beginning November 1, 1925, the sum of One Hundred Fifty Dollars (\$150) per month, payable monthly. Such monthly payment shall supersede and be in lieu of the monthly payment of \$75.00 provided for said Marye T. Deady in said will of Lucy A. H. Deady. All other payments of income provided for in said will shall remain as specified in said will, except that Henderson Brooke Deady shall continue to be paid four hundred dollars per month, or such other sum per month [138] during the administration of the estate of said Lucy A. H. Deady in the discretion of the executors as they may deem proper and until he shall become entitled to the full distribution provided for in said will, and the stipulation and agreement made by the parties October , 1924, is hereby rescinded and cancelled; but the payments of \$150 per month each to Marye T. Deady and to Mary E. Deady shall have priority over other payments of said income.

And the undersigned hereby expressly authorize and direct said executors and the trustees and managers of said property and their successor or successors, whether named in said will or otherwise appointed, to make the monthly payment of income to Marye T. Deady hereinbefore agreed to without other or further authority, direction or order from any person or any court; and the undersigned hereby authorize and direct the said executors and the

trustees and managers of said property and their successor or successors, whether named in said will or otherwise appointed, to defer the creation of a sinking fund under paragraph Fifth of the will of Lucy A. H. Deady, deceased, until after the death of either Marye T. Deady, Mary E. Deady or Henderson Brooke Deady, and upon the death of any one of said three persons named, the sinking fund provision of said will shall be effective; and the undersigned for themselves, their heirs, administrators, successors and assigns and for all persons claiming by, through or under them, or any of them, hereby expressly waive and release all claims of any and every nature whatsoever which they or any of them might have or assert against any executor, trustee or trustees, manager or managers, their heirs, administrators, successors or assigns, by reason of such monthly payments of income to Marye T. Deady, or by reason of deferring the creation of such sinking fund, or by reason of anything resulting from or attributable to such monthly payments of income to Marye T. Deady, or the deferring of such sinking fund.

It is agreed that said Marye T. Deady shall make, execute and deliver to Henderson Brooke Deady, Matthew Deady, and Hanover Deady, in proportion to their interests in said Lot 1, Block 212, City of Portland, Oregon, under said will of Lucy A. H. Deady, deceased, a

special warranty deed to said lot 1, Block 212, City of Portland, Oregon, said deed shall be subject to the terms of this agreement, and to the payment of said \$150.00 per month to said Marye T. Deady during the remainder of her life. And said lot shall be impressed with and be held in trust and remain in the possession of the trustees and the income from said property shall be collected and distributed by the trustees and said property shall be and remain charged with the payment of said \$150.00 per month to said Marye T. Deady during the remainder of her natural life.

In witness whereof, the parties have hereunto set their hands and seals this 28th day of October, 1925.

Witnessed.

L. W. Humphreys)

Chester V. Dolph) as to

(Henderson Brooke Deady (Seal)

(Matthew Edward Deady (Seal)

(Hanover Deady

John S. Coke) as to signature

Mae Connors) of Marye T. Deady

Marye T. Deady (Seal)

Mary E. Deady (Seal)

[139]

Accepted.

Henderson Brooke Deady

Joseph Simon

Executors

XXV.

That by the terms of said agreement dated October 28, 1925, the parties thereto intended to and did impose a trust and charge upon said property and the income therefrom in favor of Marye T. Deady for and in the amount of \$150.00 per month during the remainder of her natural life.

XXVI.

That by the terms of the agreement set forth in Finding No. XXIV, the parties intended to and did provide that, subject to the charge of \$150.00 per month to Marye T. Deady, for the remainder of her natural life, the other payments of income provided for in the will of Lucy A. H. Deady should remain as in said will specified, except that Henderson Brooke Deady should continue to be paid and receive \$400.00 per month, or such other sum, during the administration of the estate of Lucy A. H. Deady as the executors deemed proper, until such time as said Henderson Deady became entitled to the full distribution as provided for in said will.

Based upon the foregoing findings of fact, the court makes the following

Conclusions of Law

1. That upon the death of Lucy A. H. Deady, Henderson Brooke Deady became vested with title to an undivided two-thirds interest in Lot 1, Block 212, City of Portland, Oregon, in fee simple absolute subject to certain charges and encumbrances,

not subject to be defeated by his death thereafter without issue.

2. That on the death of Henderson Brooke Deady, Charlotte Howell Deady, as heir at law of Henderson Brooke Deady, and by devise from him, became vested with fee simple title to an undivided two-thirds [140] ($\frac{2}{3}$) interest in Lot 1, Block 212, City of Portland, Oregon.

3. That on the death of Charlotte Howell Deady, and at all times since her death, to-wit, July 12, 1935, by devise from said Charlotte Howell Deady to plaintiff, plaintiff is now and at all times has been vested with fee simple title to an undivided two-thirds ($\frac{2}{3}$) interest in Lot 1, Block 212, City of Portland, Oregon.

4. That the language used in paragraph Seventh of the Will is of doubtful import and does not evidence any intention on the part of Lucy A. H. Deady to cut down the fee previously given in paragraph Seventh to Henderson Brooke Deady if he survived her; and that Lucy A. H. Deady intended by said Seventh paragraph of her Will to substitute Matthew Edward Deady and Hanover Deady for Henderson Brooke Deady in the event he died without issue and she outlived him.

5. That plaintiff is not entitled to receive any of the income from Lot 1, Block 212, City of Portland, Oregon, accruing prior to the death of Marye T. Deady, but shall, thereafter be entitled to all the rights of owner of an undivided two-thirds ($\frac{2}{3}$) interest in fee simple in said property.

6. That the last portion of paragraph Fifth of said Will providing for the creation of a sinking fund is null, void and of no effect.

7. That all of paragraph Sixth of said Will is null, void and of no effect, except the proviso for the renewal of the present mortgage.

8. That this suit is not a will contest and is not barred by any statute of limitations nor has plaintiff been guilty of any laches.

9. That the plaintiff is the real party in interest and the only necessary party plaintiff to this suit.

10. That neither plaintiff nor his predecessors in interest are estopped from asserting that he is and they were the owners in fee simple absolute of an undivided two-thirds ($\frac{2}{3}$) interest in [141] Lot 1, Block 212, City of Portland, subject only to the charges against said property and the income therefrom in favor of Mary E. Deady, and as provided for in the will of Lucy A. H. Deady, and the further charge upon and trust created in said property in favor of Marye Thompson Deady by the agreement of October 28, 1925, set forth in Findings of Fact No. XXIV.

11. The defendant First National Bank is not vested with any rights as trustee under the will of Lucy A. H. Deady or otherwise, to said real property or the rents, income or profits thereof, and by virtue of its possession of said real property, and its receipt of the income, rents and profits thereof, is bound to make accounting therefor to plaintiff, from July 12, 1935.

12. That the defendants Hanover Deady and Matthew Deady are bound to make accounting for any rents, income and profits of any amounts received by them since July 12, 1935, which are in excess of one-third ($\frac{1}{3}$) of the net rents, income and profits of said property.

13. That decree be entered in this court in accord with these Findings of Fact and Conclusions of Law.

Done and dated this 24th day of February, 1942.

(sgd) JAMES ALGER FEE

[Endorsed]: Filed February 24, 1942. G. H. Marsh, Clerk. By R. DeMott, Deputy. [142]

—————

And afterwards, to wit, on Tuesday, the 24th day of February, 1942, the same being the 96th Judicial day of the Regular November, 1941, Term of said Court: present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to wit:

[143]

In the District Court of the United States
for the District of Oregon

No. E-9641

RICHARD HOWELL,

Plaintiff,

vs.

MATTHEW EDWARD DEADY, HANOVER
DEADY and THE FIRST NATIONAL
BANK OF PORTLAND, a national banking
association,

Defendants.

DECREE

The court having heretofore made its Findings of Fact and Conclusions of Law herein, it is hereby Ordered, adjudged, decreed and declared:

I.

That by the will of Lucy A. H. Deady, deceased, Henderson Brooke Deady, her son, became vested on her death with an undivided two-thirds interest in said Lot 1, Block 212, City of Portland, Oregon, in fee simple absolute subject only to a charge against the income from said property in favor of Mary E. Deady in the amount of \$150 per month during the term of her natural life and a charge against the property and income therefrom in favor of Marye Thompson Deady in the sum of \$75.00 per month for the term of her natural life so long as she remains unmarried.

II.

That by the will of Henderson Brooke Deady, his widow, Charlotte Howell Deady, became vested on the death of the said Henderson Brooke Deady with title to an undivided two-thirds interest in Lot 1, Block 212, City of Portland, Oregon, in fee simple absolute subject only to the charges set forth in paragraph numbered one of this decree.

III.

That by the will of Charlotte Howell Deady, her son, Richard Howell, the plaintiff herein, became vested on her death with [144] title to an undivided two-thirds interest in Lot 1, Block 212, City of Portland, Oregon, in fee simple absolute subject only to the charges set forth in paragraph numbered one of this decree.

IV.

That it was not the intention of Lucy A. H. Deady by Paragraph Seventh of her will to cut down the fee previously given, devised and bequeathed to Henderson Brooke Deady by Paragraph Third of said will if he survived her; it was her intention to substitute Matthew Edward Deady and Hanover Deady for Henderson Brooke Deady in the event that Henderson Brooke Deady died without issue and she, the said Lucy A. H. Deady, survived him.

V.

That the provision in Paragraph Fifth of the will of Lucy A. Deady creating a sinking fund

for the purpose of retiring and paying off a mortgage then existing on said real property is null, void and of no effect.

VI.

That Paragraph Sixth of said will of Lucy A. H. Deady attempting to prohibit the devisees under said will from mortgaging, partitioning, selling or otherwise encumbering said property for a period of 25 years after her death is null, void and of no effect.

VII.

That the will of Lucy A. H. Deady created no trust and the defendant, The First National Bank of Portland, Oregon, is not a trustee under said will nor is it a trustee under the agreement of October 28, 1925, between Marye Thompson Deady, Henderson Brooke Deady, Hanover Deady, Matthew Edward Deady and Mary E. Deady.

VIII.

That said agreement of October 28, 1925, last mentioned, created a trust on Lot 1, Block 212, City of Portland, Oregon, and on the income arising from said real property, to secure the payment of the sum of \$150 per month in favor of Marye Thompson Deady for the [145] term of her natural life.

IX.

That there is now no trustee to administer said trust.

X.

The defendant, The First National Bank of Portland, Oregon, since July 12, 1935, has wrongfully exercised control and possession over Lot 1, Block 212, City of Portland, Oregon, and has without lawful right held, possessed, operated, managed and collected income therefrom and made disbursements therefrom, and has held said property and the rents, income and profits thereof since July 12, 1935, by reason of its own wrongful seizure and possession of the same. And it is hereby ordered and adjudged to make an accounting as to said real property and said rents, income and profits to plaintiff and defendants Hanover Deady and Matthew Edward Deady.

XI.

That the plaintiff, Richard Howell, is not entitled to receive any of the income from said property accruing prior to the death of Marye Thompson Deady but shall thereafter be entitled to all the rights of an owner of an undivided two-thirds ($\frac{2}{3}$) interest in fee simple of said real property.

XII.

That the defendants Hanover Deady and Matthew Edward Deady are hereby ordered, adjudged and decreed to make an accounting for all sums received by them or either of them in excess of one-third ($\frac{1}{3}$) of the net income, rents and profits of said property after the payment of the charges and legacies of Mary E. Deady and Marye Thomp-

son Deady hereinbefore referred to since July 12, 1935.

XIII.

The defendant, The First National Bank of Portland, Oregon, Hanover Deady and Matthew Edward Deady shall, within 90 days from the date of this decree, file their respective accounts herein, showing all monies received from and all disbursements made out of the income, [146] rents, profits, use and operation of said property since July 12, 1935.

XIV.

This court retains jurisdiction of this suit for the purpose of hearing and determining said accounting and to make any and all necessary and appropriate orders and decrees in relation thereto for the enforcement hereof and further retains jurisdiction of this suit to make such further orders and decrees and to grant such further relief as may be equitable and proper in the execution and enforcement of this decree.

XV.

That plaintiff have and recover of defendants his costs and disbursements herein incurred, taxed at \$.....

Done in open court this 24th day of February, 1942.

/sgd/ JAMES ALGER FEE
Judge

[Endorsed]: Filed February 24, 1942. G. H. Marsh, Clerk, By R. DeMott, Deputy. [147]

And afterwards, to wit, on the 9th day of April, 1942, there was duly filed in said Court, a Notice of Appeal, in words and figures as follows, to wit:

[148]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Matthew Edward Deady, Hanover Deady and The First National Bank of Portland, defendants above named, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment and decree entered in this case on the 24th day of February, 1942, and from the whole thereof.

Dated this 8th day of April, 1942.

SIMON, GEARIN, HUMPHREYS &
FREED

EDGAR FREED

NICHOLAS JAUREGUY

Attorneys for the Appellants, Mat-
thew Edward Deady, Hanover
Deady and The First National
Bank of Portland.

Address of Attorneys,
1111 Failing Building
Portland, Oregon

[Endorsed]: Filed April 9, 1942, G. H. Marsh,
Clerk, By F. L. Buck, Chief Deputy. [149]

And afterwards, to wit, on the 9th day of April, 1942, there was duly filed in said Court, a Bond on Appeal, in words and figures as follows, to wit:

[150]

[Title of District Court and Cause.]

BOND ON APPEAL

Know all men by these presents, that we, Matthew Edward Deady, Hanover Deady and The First National Bank of Portland, (Oregon), a national banking association, as principals, and Glens Falls Indemnity Company, a corporation of the State of New York authorized to become surety upon appeal bonds, as surety, are held and firmly bound unto Richard Howell, plaintiff in the above-entitled case, his heirs, executors, administrators and assigns, in the sum of Two Hundred Fifty (\$250.00) Dollars; for the payment of which we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, by these presents.

The condition of the foregoing obligation is such that,

Whereas, said Matthew Edward Deady, Hanover Deady and The First National Bank of Portland, (Oregon), defendants in the above-entitled case, have appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a decree rendered against them and in favor of said Richard Howell, plaintiff in the above-entitled case, on the 24th day of February, 1942;

Now therefore, if said appellants shall prosecute said appeal to effect; or if they shall pay all costs, in the event said appeal is dismissed or said decree is affirmed; or if they shall pay such costs as the appellate Court may award, in the event said decree is modified; then the above obligation shall be void; otherwise it shall remain in full force and effect. [151]

In witness whereof, Matthew Edward Deady and Hanover Deady have executed these presents; The First National Bank of Portland has caused these presents to be executed by its duly authorized officer; and Glens Falls Indemnity Company has caused these presents to be executed by its duly authorized attorney-in-fact this 8th day of April, 1942.

MATTHEW EDWARD DEADY
HANOVER DEADY
THE FIRST NATIONAL BANK
OF PORTLAND, (Oregon)

By E. B. MacNAUGHTON
President

(Seal)

GLENS FALLS INDEMNITY
COMPANY
By GEO. B. RODGERS
Attorney

[Endorsed]: Filed April 9, 1942. G. H. Marsh,
Clerk, By F. L. Buck, Chief Deputy. [152]

And afterwards, to wit, on the 13th day of April, 1942, there was duly filed in said Court, a Designation of Contents of Record on Appeal, in words and figures as follows, to wit: [153]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Matthew Edward Deady, Hanover Deady and The First National Bank of Portland, defendants above named, and the appellants in the appeal of the above-entitled case to the United States Circuit Court for the Ninth Circuit, hereby designate the following for inclusion in the Record on Appeal:

The Complete record, proceedings and evidence in said case, omitting therefrom (except in the case of the Complaint, the Decree, the Notice of Appeal, the Bond on Appeal and the Supersedeas Bond) the formal parts thereof. This shall include—

Amended Complaint

Motion to Dismiss Amended Complaint

Objections to the Application of the Rules of
Civil Procedure

Order Suspending Application of Rules of
Civil Procedure

Court's Opinion on Motion to Dismiss

Order Denying Motion to Dismiss

Answer

Pretrial Order

Transcript of Testimony

All Exhibits

Court's memorandum on Admission of Evidence

Court's Opinion

Findings of Fact and Conclusions of Law

Decree

Notice of Appeal

Bond on Appeal

Supersedeas Bond

Designation of Contents of Record on Appeal

SIMON, GEARIN, HUMPHREYS &
FREED

EDGAR FREED

NICHOLAS JAUREGUY

Attorneys for the Appellants, Matthew Edward Deady, Hanover Deady and The First National Bank of Portland. [154]

Service of the within Designation of Contents of Record on Appeal is hereby accepted in Multnomah County, State of Oregon this 13th day of April, 1942, by receiving a copy thereof, duly certified to

as such by Edgar Freed of Attorneys for Defendants and Appellants.

MAGUIRE, SHIELDS, MORRISON &
BIGGS.

Of Attorneys for Plaintiff and Respondent.

[Endorsed]: Filed April 13, 1942. G. H. Marsh, Clerk, By F. L. Buck, Chief Deputy. [155]

And afterwards, to wit, on the 20th day of April, 1942, there was duly filed in said Court, a Supersedeas Bond on Appeal in words and figures as follows, to wit: [156]

[Title of District Court and Cause.]

SUPERSEDEAS BOND

Know all men by these presents, that we, Matthew Edward Deady, Hanover Deady and The First National Bank of Portland, (Oregon), a national banking association, as principals, and Glens Falls Indemnity Company, a corporation of the State of New York authorized to become surety upon appeal bonds, as surety, are held and firmly bound unto Richard Howell, plaintiff in the above-entitled case, his heirs, executors, administrators and assigns, in the sum of One Thousand (\$1,000.00) Dollars: for the payment of which we bind our-

selves, our heirs, executors, administrators, successors and assigns, jointly and severally, by these presents.

The condition of the foregoing obligation is such that,

Whereas, said Matthew Edward Deady, Hanover Deady and The First National Bank of Portland, (Oregon), defendants in the above-entitled case, have appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a decree rendered against them and in favor of said Richard Howell, plaintiff in the above-entitled case, on the 24th day of February, 1942;

Now therefore, if said appellants shall prosecute said appeal to effect; or if they shall satisfy the decree in full, together with costs, interest and damages for delay, in the event the appeal is dismissed or said decree is affirmed; or if they shall satisfy in full such modification of the decree and such costs, interest and damages as the appellate court may adjudge and award, in the event said decree is modified; then the above obligation shall [157] be void; otherwise it shall remain in full force and effect.

In witness whereof, Matthew Edward Deady and Hanover Deady have executed these presents; The First National Bank of Portland has caused these presents to be executed by its duly authorized officer; and Glens Falls Indemnity Company has caused these presents to be executed by its duly

authorized attorney-in-fact this 13th day of April, 1942.

MATTHEW EDWARD DEADY
HANOVER DEADY
THE FIRST NATIONAL BANK
OF PORTLAND, (Oregon)

By E. B. MacNAUGHTON
President

GLENS FALLS INDEMNITY
COMPANY

By GEO. B. RODGERS
Attorney

Approved:

JAMES ALGER FEE,
Judge

[Endorsed]: Filed April 20, 1942. G. H. Marsh,
Clerk, By F. L. Buck, Chief Deputy. [158]

And afterwards, to wit, on Monday, the 4th day of May, 1942, the same being the 55th judicial day of the regular March 1942 Term of said Court; present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to wit:

[159]

[Title of District Court and Cause.]

ORDER TO SEND ORIGINAL EXHIBITS TO
APPELLATE COURT

It is ordered that the Clerk of this Court send to the United States Circuit Court of Appeals for the Ninth Circuit, as a part of the Record on Appeal in this case, the original exhibits in this case instead of copies thereof.

JAMES ALGER FEE

Judge

Consented to.

MAGUIRE, SHIELDS, MORRISON & BIGGS
R. S. KESTER

Of Attorneys for Plaintiff

[Endorsed]: Filed May 4, 1942. G. H. Marsh,
Clerk. By R. DeMott, Deputy Clerk. [160]

And afterwards, to wit, on the 12th day of May, 1942, there was duly filed in said Court, a Notice of Cross-Appeal, in words and figures as follows, to wit: [161]

[Title of District Court and Cause.]

NOTICE OF CROSS-APPEAL

Notice is hereby given that Richard Howell, plaintiff above named, and appellee herein, hereby cross-appeals to the Circuit Court of Appeals for the Ninth Circuit from that portion of the decree

entered herein by the District Court of the United States for the District of Oregon on or about the 24th day of February, 1942, which provided as follows:

“XI.

“That the plaintiff, Richard Howell, is not entitled to receive any of the income from said property accruing prior to the death of Marye Thompson Deady but shall thereafter be entitled to all the rights of an owner of an undivided two-thirds ($2/3$) interest in fee simple in said real property.”

Dated at Portland, Oregon, this 12 day of May, 1942.

MAGUIRE, SHIELDS, MORRISON &
BIGGS

Of Attorneys for Richard Howell,
Plaintiff, Appellee and Cross-Appellant.

MAGUIRE, SHIELDS, MORRISON & BIGGS,
Attorneys for Richard Howell,
723 Pittock Block,
Portland, Oregon.

[Endorsed]: Filed May 12, 1942. G. H. Marsh,
Clerk, By F. L. Buck, Chief Deputy. [162]

And afterwards, to wit, on the 12th day of May, 1942, there was duly filed in said Court, a Bond for Costs on Cross-Appeal in words and figures as follows, to wit: [163]

[Title of District Court and Cause.]

COST BOND ON CROSS-APPEAL

Know all men by these presents, that we, Richard Howell, as principal, and United States Fidelity & Guaranty Company, a corporation of the State of Maryland, qualified to do and transact a general surety business within the State of Oregon, as surety, are held and firmly bound unto Matthew Edward Deady, Hanover Deady and The First National Bank of Portland, a national banking association, in the full and just sum of Two Hundred Fifty and no/100 (\$250) Dollars to be paid to the said obligees, their attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, jointly and severally; by these presents.

Sealed with our seals and dated this 12th day of May, 1942.

Whereas, in the District Court of the United States for the District of Oregon, in a cause pending in said court between Richard Howell, plaintiff, and Matthew Edward Deady, Hanover Deady and The First National Bank of Portland, a national banking association, defendants, a decree was rendered against the said defendants and in part against the said plaintiff, and the said defendants having filed in said court a notice of appeal to reverse said decree, and the said plaintiff having filed in said court a notice of cross-appeal to [164] re-

verse that portion of said decree which was adverse to said plaintiff, and said appeal and -cross-appeal are now pending in the United States Circuit Court of Appeals for the Ninth Circuit at a session of said Circuit Court of Appeals to be holden at San Francisco in the State of California;

Now the condition of the above obligation is such that if the said plaintiff and cross-appellant shall prosecute said cross-appeal to effect, and satisfy such order for payment of costs as may be made if for any reason said cross-appeal is dismissed or if the portion of the decree so appealed from is affirmed, then the above obligation to be void, otherwise to remain in full force and effect.

Dated this 12th day of May, 1942.

RICHARD HOWELL,

Principal

By MAGUIRE, SHIELDS, MORRISON &
BIGGS

His Attorneys

UNITED STATES FIDELITY &
GUARANTY COMPANY,

Surety

By RAYMOND C. WEIN (Seal)

Attorney-in-Fact

Countersigned:

J. C. CORBIN CO.

Agent

[Endorsed]: Filed May 12, 1942. G. H. Marsh,
Clerk, By F. L. Buck, Chief Deputy. [165]

And afterwards, to wit, on the 12th day of May, 1942, there was duly filed in said Court, Cross-Appellant's Designation of Contents of Record on Appeal, in words and figures as follows, to wit:

[166]

[Title of District Court and Cause.]

CROSS-APPELLANT'S DESIGNATION OF
CONTENTS OF RECORD.

Notice is hereby given that Richard Howell, plaintiff above named, and appellee and cross-appellant herein hereby designates for inclusion in the record on appeal herein the complete record and all the proceedings and evidence in this cause, as heretofore designated by the defendants, appellants and cross-appellees herein, and as heretofore compiled and certified by the clerk of this court under date of May 6, 1942, with the following additions thereto:

Notice of Cross-Appeal

Cost Bond on Cross-Appeal

Cross-Appellant's Designation of Contents of
Record (This designation).

Dated at Portland, Oregon, this 12 day of May,
1942.

MAGUIRE, SHIELDS, MORRISON &
BIGGS

Of Attorneys for Cross-Appellant
MAGUIRE, SHIELDS, MORRISON &
BIGGS,

Attorneys for Cross-Appellant,
723 Pittock Block,
Portland, Oregon.

[Endorsed]: Filed May 12, 1942. G. H. Marsh,
Clerk, By F. L. Buck, Chief Deputy. [167]

United States of America,
District of Oregon—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered from 1 to 167 inclusive, constitute the transcript of record on appeal from a decree of said Court in a cause therein numbered E-9641, in which Richard Howell is plaintiff, appellee, and cross-appellant, and Matthew Edward Deady, Hanover Deady and The First National Bank of Portland, a national banking association are defendants, appellants, and cross-appellees; that said transcript has been prepared by me in accordance with the designations of contents of the record on appeal filed therein by

appellants and cross-appellant and in accordance with the rules of Court; that I have compared the foregoing transcript with the original record thereof and that the foregoing transcript is a full, true and correct transcript of the record and proceedings had in said Court in said cause, as the same appear of record and on file at my office and in my custody, in accordance with the said designations.

I further certify that the cost of the foregoing transcript is \$5.00 for filing Notice of Appeal, and \$26.55 for comparing and certifying the within transcript, making a total of \$31.55, and that the same has been paid by said appellants; and \$5.00 for filing Notice of Cross-Appellant and ninety cents for comparing and certifying transcript required by the designation of the cross-appellant, making a total of \$5.90, which has been paid by cross-appellant.

I further certify that I am transmitting with said transcript, one of the copies of the reporter's transcript of proceedings at the trial of said cause filed with the designation of contents of the record.

I further certify that pursuant to an order of the Court appearing in the said transcript of record, I am forwarding to the said United States Circuit Court of Appeals for the Ninth Circuit, all of the original exhibits introduced in said cause, being plaintiffs' exhibits 1 to 5 inclusive, and 9 & 10, and defendant's exhibits A to R inclusive.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Portland, in said District, this 13th day of May, 1942.

(Seal)

G. H. MARSH,

Clerk. [168]

[Title of District Court and Cause.]

TRANSCRIPT OF TESTIMONY
AND PROCEEDINGS

Hearing held at Portland, Oregon

Before: Honorable James Alger Fee

January 21, 1941 to January 24, 1941

Mr. Grant: At this time, your Honor, the plaintiff has three pre-trial exhibits, each of which is identified in the pre-trial order and to which no objection was made. Those are pre-trial exhibits 1, 2 and 3, and we offer them at this time.

Mr. Jaureguy: No objection.

The Court: Admitted.

(The documents referred to, so offered and received, were thereupon marked received as follows:

Typewritten copy of Last Will and Testament of Henderson Brooke Deady, consisting of one [25] page of typewritten matter, having previously been marked as Plaintiff's Pre-Trial

Exhibit 1, was marked received as Plaintiff's Exhibit 1;

PLAINTIFF'S PRE-TRIAL EXHIBIT No. 1

LAST WILL AND TESTAMENT

I, Henderson Brooke Deady, of the City of Portland, State of Oregon, being of sound and disposing mind and memory, do make, publish and declare the following to be my Last Will and Testament, hereby revoking all other and former wills by me at any time made.

First: I nominate and appoint Robert H. Strong of the City of Portland, State of Oregon, sole executor of this, my Last Will and Testament, and direct that no bond of any sort shall be required of him.

Second: I give, devise and bequeath unto my beloved wife, Charlotte Howell Deady, all my property, real and personal, of every name, nature and kind, wheresoever the same may be situated.

Third: Under Paragraph 8 of the Last Will and Testament of my beloved mother, Lucy A. H. Deady, executed the 29th day of July, 1920, I am authorized and permitted to bequeath by my Last Will and Testament to my wife, the income which would be derived by me, if living, from two-thirds of Lot 1, Block 212, City of Portland, State of Oregon, for and during the term of her natural life. I now, under and by virtue of said Paragraph 8 of my said beloved mother's will, bequeath said income from said two-thirds of Lot 1, Block 212,

City of Portland, State of Oregon, to my beloved wife, Charlotte Howell Deady, for and during the term of her natural life, and nominate and constitute her my appointee under said Paragraph 8 of the said will of Lucy A. H. Deady.

In witness whereof, I have hereunto set my hand and seal this 22d day of October, 1932.

HENDERSON BROOKE DEADY (Seal)

The above and foregoing was duly signed, sealed, published and declared by the said Henderson Brooke Deady to be his Last Will and Testament, in our presence, and we and each of us in his presence and in the presence of each other and at his request signed our names as witnesses thereto on the date therein named and the said Henderson Brooke Deady was at said time, in our opinion, of sound and disposing mind and memory and free from restraint of any sort.

Names	Addresses
RALPH C. DODD	New Milford, Conn.
JOHN S. ADDIS	New Milford, Conn.

[Endorsed]: Filed Feb. 21, 1942.

Typewritten copy of Last Will and Testament of Charlotte Howell Deady, consisting of two pages of typewritten matter, having previously been marked as Plaintiff's Pre-Trial Exhibit 2, was marked received as Plaintiff's Exhibit 2;

PLAINTIFF'S PRE-TRIAL EXHIBIT No. 2

I, Charlotte Howell Deady, of New Milford, Connecticut, do hereby make, publish and declare this to be my Last Will and Testament, hereby revoking all other and former wills by me made.

First: I do hereby order and direct that all of my just debts and funeral expenses be paid out of my estate as soon after my decease as possible.

Second: I give, devise and bequeath unto my beloved husband, Dr. Henderson Brooke Deady, all my estate, real, personal and mixed, wheresoever situated, absolutely and forever.

Third: If my beloved husband, Dr. Henderson Brooke Deady, should predecease me, I give, devise and bequeath unto my son, Richard Howell Busek, also known as Richard Howell, my farm in New Milford, Connecticut, consisting of house, barn and approximately sixty acres (60) of land, and all the contents and furnishings of said house and machinery and apparatus and stock and poultry on said farm.

Fourth: In case my beloved husband, Dr. Henderson Brooke Deady, should predecease me, I further give, devise and bequeath unto my beloved

son, Richard Howell Busck, also known as Richard Howell, all my other property, real, personal and mixed, wheresoever situated and of any kind or nature whatsoever, including all money which I may have in any bank or banks at the time of my decease, also all notes, bonds, and stocks, and bonds and mortgages owned by me at the time of my decease, and all debts which may be owing to me at said time.

Fifth: I make no provision for my daughter, Karen Busck, in this, my Last Will and Testament, because she has arrived at her majority and has received her education and is self supporting.

Sixth: I nominate, constitute and appoint Dr. Henderson Brooke Deady to be executor of this, my Last Will and Testament; if my said beloved husband, Dr. Henderson Brooke Deady, should predecease me, I nominate, constitute and appoint my beloved son, Richard Howell Busck, also known as Richard Howell, to be executor of my Last Will and Testament, and direct that no bond or other security be required of either of them for the faithful performance of their duties.

In witness whereof I have hereunto set my hand and seal this fourth day of May, in the year One Thousand Nine Hundred and Thirty-three.

CHARLOTTE HOWELL DEADY (Seal)

Witnessed by:

JOHN M. SCOBLE

MARIVA INGLING

K. COURTENAY JOHNSTON

The foregoing instrument was subscribed, sealed, published and declared by Charlotte Howell Deady, the testatrix above named, as and for her last Will and Testament, in the presence of each of us, who, at her request, in her presence and in the presence of each other, have hereunto subscribed our names as witnesses the day and year above written.

MARIVA INGLING

residing at 259 Edward St.

Ridgewood, N. J.

K. COURTENAY JOHNSTON

residing at 461 West 22 Street

City of New York

JOHN M. SCOBLE

residing at 988 Lincoln Place

Brooklyn, N. Y.

[Endorsed]: Filed Feb. 21, 1942.

Carbon copy of letter, bearing date March 14, 1936, Maguire, Shields and Morrison to Matthew Edward Deady and Hanover Deady, consisting of one page of typewritten matter, having previously been marked as Plaintiff's Pre-Trial Exhibit 3, was marked received as Plaintiff's Exhibit 3.)

Mr. Maguire: And, further, that it could not be construed as any act or admission of Henderson Brooke Deady, who was then deceased; not being his act and not being the act of either the plaintiff here or any predecessor in interest of the plaintiff, it is wholly inadmissible. [27]

The Court: I took it that the point of offering this document was the construction placed thereon by the person in whom the title was at the time of the declaration, and the interest in the property that existed at the time of the declaration. [43]

The Court: As the Court views it, the construction placed upon the will of Henderson Brooke Deady by the administrator is not particularly persuasive, and, in the second place, it is doubtful in my mind as to whether it is binding upon a person who received the property by the terms of the will, if they did so receive it. Some of the things that have been talked about here, not this particular document, it seems to me may be admissible. That is, the construction, if there was a construction, by Henderson Deady I think might be somewhat persuasive. Why the construction placed upon the will of Henderson Brooke Deady should have any relation to it I can't understand, entirely outside of and not connected with these family transactions, at least, and I don't know why he should know what the will meant any more than the Court, and apparently he and the Court did not construe it alike. So it is very doubtful about this piece of evidence and I don't see any ruling for it in that respect.

There is one case where Mr. Jaureguy read from the notes that says anything about the executors and administrators. The Oregon case, on the other hand, shows the testamentary trustee construction, as a matter of fact. My ruling at the present is that I will exclude it.

Mr. Jaureguy: If your Honor please, we would like to have it marked by the reporter as an offered exhibit and an [64] offer of proof.

The Court: Of course, it is in the pre-trial order. I don't know anything about the technicality of it, but anything that is necessary to protect the record.

Mr. Jaureguy: Yes, if it is agreeable, I would like to have the reporter mark it as an offered exhibit, excluded.

Mr. Maguire: May we understand, are these exhibits to be re-marked, or will the markings that are on them——

The Court: (Interrupting) They are marked in evidence as they are offered.

(Said certified photostatic copy of Petition for Probate of the Will of Henderson Brooke Deady, so offered and excluded, having previously been marked as Defendants' Pre-Trial Exhibit A, was marked as offered and excluded on trial.)

DEFENDANTS' PRE-TRIAL EXHIBIT A

In the Circuit Court of the State of Oregon for
the County of Multnomah
Probate Department

No. 36403

In the Matter of the Estate of

HENDERSON BROOKE DEADY,

Deceased.

PETITION FOR PROBATE OF WILL

To the Honorable George Tazwell, Judge of the
above entitled Court:

Comes now Robert H. Strong and respectfully shows to the court that Henderson Brooke Deady died in New Milford, Connecticut on or about the 28th day of May, 1933, and at the time of his death was a resident and inhabitant of New Milford, State of Connecticut, and left an estate consisting of real property situated in Multnomah County, Oregon, consisting of Lots 16 to 21, both inclusive, in Block 3, Mountain View Park #2, Multnomah County, Oregon, of the approximate value of \$100 and with an annual rental value of not exceeding \$5.00, and the right of appointment and bequest to his then wife, Charlotte Howell Deady, of the income from two-thirds of Lot 1, Block 212, City of Portland, State of Oregon, for and during the term of the natural life of the said Charlotte Howell Deady.

That on the 22nd day of October, 1932, the said Henderson Brooke Deady duly made, executed and published his last will and testament, which will was so made, executed and published by him at that time in the presence of Ralph C. Dodd, residing at New Milford, Connecticut, and John S. Addis, residing at New Milford, Connecticut, which will is herewith presented to the court in order that the same may be duly proved and admitted to probate as and for the last will and testament of said Henderson Brooke Deady, deceased.

That at the time of the execution of said will the said Henderson Brooke Deady was over the age of twenty-one years and was of sound and disposing mind and memory, was not acting under fraud, duress or undue influence and was fully capable, mentally and physically, to make and execute his last will and testament.

That in and by the said last will and testament your petitioner, Robert H. Strong, was duly designated, nominated and appointed as executor of the said last will and testament.

That your petitioner, Robert H. Strong, is a resident of Multnomah County, Oregon, and is competent and qualified to act as such executor; that in and by said will your petitioner as such executor is not required to give any bond for the faithful performance and discharge of his duty as executor of said last will and testament.

That decedent left surviving him as his sole and only heir at law his wife, Charlotte Howell Deady,

and the said Charlotte Howell Deady is the sole and only devisee and legatee under said last will and testament.

That it is necessary and proper at this time that said last will and testament of said decedent shall be proved and admitted to probate as by law directed and that the same shall be declared to be the last will and testament of said decedent, and that your petitioner, Robert H. Strong, be appointed as sole executor of the last will and testament and estate of the decedent.

Wherefore, your petitioner prays that an order issue from and out of this court authorizing and directing that the deposition of the said subscribing witnesses to said last will and testament, towit, Ralph C. Dodd and John S. Addis, or such one of them as may be found, be taken in accordance with the provisions of the law of this state for taking depositions, and that in said deposition or depositions the said subscribing witnesses be interrogated as to the execution, making, declaring and publication of said last will and testament and the due witnessing thereof by them, and as to such other matters as may be appropriate to establish the testamentary capacity of the decedent and the validity of said will, and that upon the receipt of said depositions or other proof of the due execution of said will and the testamentary capacity of the decedent that the said will be admitted to probate and recorded and declared and decreed to be the last will

and testament of said decedent, and that this court appoint your petitioner, Robert H. Strong, as sole executor of said last will and testament to serve without bond.

ROBERT F. MAGUIRE

Attorney for Petitioner

State of Oregon,
County of Multnomah—ss.

I, Robert H. Strong, being first duly sworn, say that I am the Petitioner in the within entitled Estate and that the foregoing Petition is true as I verily believe.

ROBERT H. STRONG

Subscribed and sworn to before me this 27th day of June, 1933.

(Seal)

LELAND B. SHAW,

Notary Public for Oregon

My Commission expires Jan. 8, 1935.

[Endorsed]: Office of County Clerk, Multnomah County, Oregon. Filed June 30, 1933. A. A. Bailey, Clerk. F. O. McGraw, Deputy.

State of Oregon,
County of Multnomah—ss.

I, A. A. Bailey, County Clerk, Ex-Officio Recorder of Conveyances and Ex-Officio Clerk of the Circuit Court of the State of Oregon, for the County of Multnomah, which Court has exclusive jurisdiction of all probate proceedings in said

County, do hereby certify that the foregoing copy of Petition for probate of Will in the Matter of the Estate of Henderson Brooke Deady, Deceased, has been compared by me with the original, and that it is a correct transcript therefrom, and of the whole of such original Petition as the same appears on file in my office and in my custody.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, this 15th day of May, A. D., 1940.

(Seal)

A. A. BAILEY,

County Clerk.

By E. L. FERGUSON,

Deputy.

[Endorsed]: Filed Feb. 21, 1942.

Mr. Jaureguy: We now offer in evidence Pre-Trial Exhibit B. Defendants' Pre-Trial Exhibit B, which is the inventory and appraisal filed by the executor of the Estate of Henderson Brooke Deady, decedent, on the 14th day of June, 1935, and in that connection I ask Mr. Maguire if he will admit for the purposes of this case that on that date Leland B. Shaw was an assistant in his office? He is the notary public.

Mr. Maguire: Yes, Mr. Shaw was employed in my office at [65] that time.

Mr. Jaureguy: I think there are no further arguments I could make in favor of this document

that I have not already made in favor of the other, I mean on the admissibility of it. I think as far as the weight is concerned it has considerably more weight, because I think the Court will take notice of the fact that when an executor prepares a petition he may not have gone to the extent of trying to ascertain the property, whereas in this case, two years later, when he prepares the inventory and appraisement, I would say it has much more weight as far as the competency is concerned. All the considerations that we have considered before are available here.

The Court: The ruling will be the same.

Mr. Jaureguy: And we ask that this be marked as an offered exhibit.

(Certified copy of Inventory and Appraisement of the Estate of Henderson Brooke Dedy, so offered and excluded, having previously been marked as Defendants' Pre-Trial Exhibit B, was thereupon marked as offered and excluded on trial.)

DEFENDANTS' PRE-TRIAL EXHIBIT B

In the Circuit Court of the State of Oregon,
for the County of Multnomah

In the Matter of the Estate of

HENDERSON BROOKE DEADY,

Deceased.

INVENTORY AND APPRAISEMENT

I, A. A. Bailey, County Clerk of the County of Multnomah do hereby certify that Wilbur Falloon Fred Strong and Delmas R. Richmond were duly appointed appraisers of the estate of Henderson Brooke Deady deceased, by order of the County Court, duly entered and recorded on the 10th day of May, A. D. 1935.

Witness my hand and seal of said County Court, this 14th day of June, A. D. 1935.

A. A. BAILEY,

County Clerk,

By T. M. GEOGHEGAN,

Deputy.

State of Oregon,

County of Multnomah—ss.

Wilbur Falloon, Fred Strong, Delmas Richmond, duly appointed appraisers of the estate of Henderson Brooke Deady deceased, being first duly sworn, say and each for himself says, that I will truly, honestly and impartially appraise the property of

said estate which shall be exhibited to me, according to the best of my knowledge and ability.

WILBUR FALLOON

FRED STRONG

DELMAS R. RICHMOND

Subscribed and sworn to before me this 6th day of June, A. D. 1935.

(Seal)

LELAND B. SHAW

Notary Public for Oregon.

My commission expires Jan. 2, 1939.

State of Oregon,

County of Multnomah—ss.

I, Robert Strong the Executor of the estate of Henderson Brooke Deady deceased, being duly sworn, say, that the annexed inventory contains a true statement of all the real and personal property of the said deceased which has come to my knowledge and possession and particularly of all money belonging to the said deceased, and of all just claims of the said deceased against the said

.....
ROBERT H. STRONG

Subscribed and sworn to before me this 6 day of June, A. D. 1935.

(Seal)

LELAND B. SHAW

Notary Public for Oregon

My commission expires Jan. 2, 1939.

Estate of.....Deceased,
To.....Appraiser, Dr.

To compensation for services in appraising said estate, items as follows:

.....days' services at \$.....per day each, \$.....

Necessary disbursements as follows:

State of Oregon,
County of Multnomah—ss.

Wilbur Falloon, Fred Strong, Delmas Richmond, the appraisers above named, being duly sworn, say, and each for himself says, that the foregoing bill of items is correct and just, and that the services have been duly rendered as therein set forth.

WILBUR FALLOON

FRED STRONG

DELMAS R. RICHMOND

Subscribed and sworn to before me this 6 day of June, A. D. 1935.

(Seal)

LELAND B. SHAW

Notary Public for Oregon

My commission expires Jan. 2, 1935.

In the Circuit Court of the State of Oregon,
County of Multnomah

In the matter of the Estate of HENDERSON
BROOKE DEADY, Deceased.

INVENTORY AND APPRAISEMENT.

Moneys belonging to the said deceased which have
come to the hands of the Lots 16 to 21 both in-
clusive in block 3 Mountain View Park #2, Mult-
nomah County, Oregon, \$100.00.

Amount carried forward, \$.....

We, the undersigned, duly appointed appraisers
of the estate of.....deceased,
hereby certify that the property mentioned in the
foregoing inventory has been exhibited to us, and
that we appraise the same at the sum set opposite
each item in said inventory set down, and amount-
ing in all to the sum of One Hundred no/100 Dollars,
(\$100.00)

Dated June 6, 1935.

WILBUR FALLOON

FRED STRONG

DELMAS R. RICHMOND

State of Oregon,
County of Multnomah—ss.

I, A. A. Bailey, County Clerk, Ex-Officio Re-
corder of Conveyances and Ex-Officio Clerk of the
Circuit Court of the State of Oregon, for the County

of Multnomah, which Court has exclusive jurisdiction of all probate proceedings in said County, do hereby certify that the foregoing copy of Inventory and Appraisement in the Matter of the Estate of Henderson Brooke Deady, Deceased, has been compared by me with the original, and that it is a correct transcript therefrom, and of the whole of such original Inventory and Appraisement as the same appears on file in my office and in my custody.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, this 15th day of May, A. D. 1940.

(Seal)

A. A. BAILEY,

County Clerk.

By E. L. FERGUSON,

Deputy.

[Endorsed]: Filed Feb. 21, 1942

Mr. Jaureguy: We will call Mr. Weinstein. [66]

SAMUEL B. WEINSTEIN

was thereupon produced as a witness in behalf of the defendants herein and, having first been duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

A. Samuel B. Weinstein.

(Testimony of Samuel B. Weinstein.)

Direct Examination

By Mr. Jaureguy:

Q. Mr. Weinstein, you are a resident of Portland? A. I am.

Q. And what is your profession?

A. Lawyer.

Q. How long have you been practicing your profession here? A. Since 1922.

Q. And has that been continuous, in this city?

A. It has.

Q. And, accordingly, you were practicing your profession in 1933, 1934 and 1935?

A. I have been.

Q. 1923, '24 and '25, and ever since then up to the present time? A. Correct.

Q. Now, are you acquainted with Amalie B. Deady?

A. I was acquainted with her.

Q. And did you ever represent her as her attorney? [67]

A. I did represent her in a divorce suit.

Q. In what connection?

A. I represented Mrs. Amalie B. Deady in a divorce suit of Henderson B. Deady versus Amalie B. Deady.

Q. Now, were there any negotiations for a property settlement in connection with that divorce suit? A. There were.

(Testimony of Samuel B. Weinstein.)

Q. And with whom did you conduct those negotiations?

A. I conducted those negotiations with Attorney Chester V. Dolph.

Q. And in connection with those negotiations did you ever talk to Henderson Brook Deady?

A. I did.

Q. And when was that?

A. That was sometime during the year 1925.

Q. Could you tell us about when those negotiations started?

A. Started sometime in the summer, I think in June, and went through to September, 1925.

Q. I wish you would just tell us what those negotiations were, giving us the names of the parties and the occasions, as nearly as you can remember.

Mr. Maguire: You mean the subject of the negotiations?

Mr. Jaureguy: Yes.

Mr. Maguire: Or the conversations?

Mr. Jaureguy: Yes. [68]

Mr. Maguire: Which?

Mr. Jaureguy: Conversations.

Mr. Maguire: Well, as to any conversations alleged to have been held between this witness and Chester V. Dolph, we object to them as being wholly incompetent to prove or disprove any issue in this case, not binding upon plaintiff herein, and not competent to prove or disprove the testamentary

(Testimony of Samuel B. Weinstein.)

intention of Lucy A. H. Deady, and not made or had with any person claiming or having any legal right under the will of Lucy A. H. Deady, therefore, wholly irrelevant and immaterial.

Now, then, so far as the statements, or alleged statements or conversations had between this witness or in his presence and with Henderson Brooke Deady, we also object that those are wholly incompetent and irrelevant to prove or disprove any issue in this case, for the reason that the intention of the testator cannot be proved or disproved by such testimony; and, further, that the conversations, if any, were not had between, nor related to the rights of any person, with a person claiming to have any right, title or interest under the will of Lucy A. H. Deady.

The Court: You may answer this question. I don't think there are other matters involved at present.

The Witness: Will you please read that question for me?

(The question referred to was thereupon read.)

A. Does that sort of permit me to give the background of this [69] matter, your Honor?

The Court: No; just answer.

A. In 1925 I was in the office of Charles C. Hindman, then an attorney, a practicing attorney, in the city of Portland. The matter of a divorce

(Testimony of Samuel B. Weinstein.)

between Henderson Brooke Deady and Amalie B. Deady came to his attention through a firm of New York attorneys. He requested that I handle that matter and I started to investigate the circumstances concerning that particular problem. In that investigation I discovered that Chester V. Dolph was the attorney representing Dr. Henderson Brooke Deady. The question at that time was as to whether or not Amalie B. Deady, the client of our office, could obtain a divorce in the state of Oregon. I was satisfied that she did not have the required residential period to file for divorce and I so advised the correspondent attorneys in New York, that she was then living in New York and she would have to establish a residence in the state of Oregon for at least one year prior to the commencement of any suit for divorce. I suggested, however, in light of the situation, that she file a——

Mr. Maguire: (Interrupting) If the Court please, I object to this as not being responsive to the question.

The Court: Well, it is obviously not. Objection sustained.

Mr. Jauregui: Q. Then at some subsequent—after that investigation that you spoke about did you negotiate with [70] Henderson Brooke Deady and his attorney with respect to this?

A. Subsequently, in the lapse of some months, I did negotiate with reference to a divorce suit and property settlement between the parties, and

(Testimony of Samuel B. Weinstein.)

in those negotiations I carried it on with Chester V. Dolph and on two occasions with Dr. Henderson Brooke Deady in person in the office of Chester V. Dolph. The result of the negotiations was a stipulation with reference to some property arrangements, with reference to other payments of money, which was reduced to writing and made a part of the decree that was subsequently entered in the Circuit Court of Multnomah County, in which a decree of divorce was granted to Amalie B. Deady and the property settlement was incorporated therein.

Q. Now, in connection with these negotiations and conversations you had with Dolph and with Henderson Brooke Deady was there any conversation with respect to what Henderson Brooke Deady got under the will of his mother?

A. There was.

Mr. Maguire: Just a moment. We object to that on the same ground, and on the further grounds that the question itself is indefinite and would include both conversations had with C. V. Dolph and with Henderson Brooke Deady, without any distinction between the two. I cannot make my objections—I think there is a separate ground of objections with regard to Dolph's statements than there would be with regard to Dr. [71] Deady.

The Court: I think the question as to Henderson Brooke Deady should be separated.

Mr. Jaureguy: Q. Whom did you talk to first in

(Testimony of Samuel B. Weinstein.)

connection with these negotiations, to Henderson Brooke Deady or to his attorney?

A. To his attorney first.

Q. And in connection with your investigations with his attorney was there any discussion as to what Mr. Deady got under the will of his mother?

A. Yes, very thorough discussion.

Q. And what was that?

Mr. Maguire: Object to that upon the same grounds as heretofore suggested to your Honor, unless your Honor desires me to again elaborate.

The Court: Well, I think we had better establish a *modus operandi* here. I want all this testimony to go into the record, whatever my rulings are, in order that the whole record may be prepared, in the event that I have the power to include it in the record, in whatever form it will best protect the rights of the parties in an offer of proof as to testimony. I am not at present convinced that the declarations of an attorney in dealing with this matter are competent. I therefore reject it and will proceed to take the testimony in the record.

Mr. Jaureguy: All right. Then I think we do not need to [72] save the formal exception under the rules.

The Court: No, I think not, Mr. Jaureguy. For the purpose of this case, if there is any question about that, I will give you an exception every time

(Testimony of Samuel B. Weinstein.)

that you get me to rule and I rule contrary to an objection that is made by either side.

Mr. Jaureguy: Very well.

Q. Now, will you just state what the conversations were with Chester Dolph?

A. Mr. Dolph tried to convey to me the situation that Dr. Henderson Brooke Deady had no substantial resources with which to make the kind of property settlement that I was urging as a protection for Mrs. Amalie B. Deady. I was then of the impression that he was in a position to make a——

Mr. Maguire: Pardon me. I must object. We are talking about conversations, and I think the witness should limit himself to what the conversations were and not to his impressions or conclusions from it. It makes it a little difficult in the record, and I know how difficult it is for a lawyer to testify.

A. All right, I will try to do that.

The Court: Yes. I desire to have listed the conversations as they were and, as far as you can, you will form definite expressions.

A. I will try to, your Honor.

The Court: And without too much interjection from the Court.

A. I was requesting a substantial sum of money, either in [73] cash or in installments over a period of years, for Mrs. Deady. Mr. Dolph stated that that was not possible, that he was receiving—that

(Testimony of Samuel B. Weinstein.)

is, that Henderson Brooke Deady was receiving a small income out of some property devised to him by his mother, and that under the terms of his mother's will all that Henderson Brooke Deady has was a power of appointment, that that power of appointment must be exercised in favor of his wife. That was the statement made to me by Mr. Dolph.

Mr. Jaureguy: Q. Prior to the time that you talked to Mr. Dolph *that* you read the will of Lucy A. H. Deady?

A. I was furnished a copy of that will by Mr. Dolph and I read it.

Q. And how many conversations did you have with Mr. Dolph?

A. Oh, it extended over a period of several months.

Q. Now, you say that Mr. Dolph pointed out to you that all that Henderson Brooke Deady had was the income and the power of appointment in favor of his wife. Did he make any statement as to whether or not Mr. Deady would exercise that in favor of your client?

A. He made the statement that he would not exercise it in favor of my client unless some reasonable arrangement could be arrived at.

Q. Now, thereafter you say you had conversations in his office when Mr. Deady was present?

A. Yes. [74]

Q. And was Mr. Dolph also present?

(Testimony of Samuel B. Weinstein.)

A. Yes.

Q. I think you said there were two of those occasions?

A. Two occasions that I had towards the conclusion of the negotiations. We had, I recollect, a conference in Mr. Dolph's office in the Mohawk Building when Dr. Henderson Brooke Deady was present, Mr. Dolph, and myself.

Q. Now, will you just state the conversations that took place on those two occasions.

Mr. Maguire: To the receipt of this testimony in response to this question the plaintiff objects on the ground that it is not competent to prove or disprove any issue in this case, that it does not prove or is not competent to prove or disprove the testamentary intent of Lucy A. H. Deady, that it would not be binding upon Henderson Brooke Deady if he were alive and a party to this litigation and is not binding upon the plaintiff here, and that it is not a conversation had in the presence of or affecting the rights or to one having any rights under the will of Lucy A. H. Deady, and it is not part of a family settlement under any rule contended for by the defendants, and does not constitute a matter of estoppel.

Mr. Jaureguy: I want to make one correction there. He can talk about—oh, family settlements under the rule contended for by defendants?

Mr. Maguire: Yes. [75]

Mr. Jaureguy: Yes, I think I gave your Honor

(Testimony of Samuel B. Weinstein.)

sufficient authorities here that this construction by interested parties is by no means limited to family settlements. In fact, in *Stubbs vs. Abel* it was a representation made by one of the devisees to a third person, that is, to the Court, in which the remainder of the parties were not involved, as I recall. At any rate, there were many of the other cases here where there is merely the construction, and the family settlement part of it was merely in the court case, and that is just by inference that they have put a family settlement there, but that document was not really a family settlement, but merely a representation.

The Court: If you desire to ask the question, I can state offhand that my impression is that the question is probably competent, this evidence as to what *Henderson Brooke Deady* said.

Mr. Jaureguy: You say your offhand impression is that it is competent?

The Court: It is competent and should be admitted. If you wish to argue the matter I will hear you.

Mr. Jaureguy: Well, if it is your offhand impression I would rather wait until somebody indicates that you got rid of that impression before I argue it. It is in our favor.

Mr. Grant: If your Honor please. I would like to state this, to go back to *Stubbs vs. Abel* and these other cases, [76] you take these cases of

(Testimony of Samuel B. Weinstein.)

practical construction by interested parties, everyone of them, I believe,—and we have been through that annotation—is a case where the heirs under the will were making a family settlement or a case where there is an actual basis for an estoppel between the parties involved in the present litigation, or where cases where the property had been distributed to the heirs under the will being challenged and that distribution had been acquiesced in, like the dividing line on top of the ridge case that was mentioned. The cases, many of them, go further and have specific agreements.

Now, in the Oregon cases that were cited, we had one a case where as between the interested parties to a trust one of them had come in asking for an instruction from the Court on a theory which he now has repudiated and the result of which was to give him more money out of that trust. They were directly affected. This particular testimony would be his statement to some third person not affected in this case, not affected by the will, as far as its interpretation between these boys and Henderson Brooke Deady is concerned.

The Court: But was a person in the interest of a person who was connected.

Mr. Grant: Yes, Henderson Brooke Deady.

The Court: No, his wife.

Mr. Grant: His wife was interested in knowing what the will gave him, that is true, just the same as a creditor might— [77]

(Testimony of Samuel B. Weinstein.)

The Court: (Interrupting) No, there were two of them that were interested in the will, isn't that true?

Mr. Grant: The two parties talking, you mean?

The Court: Yes.

Mr. Grant: Were interested in what the will contains.

The Court: In other words, you draw a distinction between two members of the family and all the family.

Mr. Grant: On a family settlement, I am talking about a settlement between the heirs under a will who agree on a certain construction and either write it out in a contract or divide it up and abide by it. That is the kind of thing the courts say they ought to go a long ways to uphold. That is not the situation here, and this is not claimed to be the basis for any settlement between Henderson Brooke Deady and the other heirs, neither is it claimed as a basis for an estoppel where the result of the action resulted either to his benefit or to their detriment, and we do not think simple extraneous observations by Henderson Brooke Deady are competent to show either her intent or admissible as his construction of the will. Extraneous evidence is not admissible just because somebody, somewhere in the chain of title somewhere, made a statement concerning it.

The Court: That is not the ordinary rule, is it?

(Testimony of Samuel B. Weinstein.)

Is that the ordinary rule about the statements of an ancestor in relation to real property? [78]

Mr. Jaureguy: Any statement made by an ancestor—that is an entirely different rule, as your Honor recalls, than the rule we have been talking about here. There is still a different rule, which is statutory in this state, that any statement made by an owner with respect to his real property is admissible as against his successor in interest. That is still a different rule.

Mr. Maguire: That rule has no application here.

Mr. Jaureguy: Well, it does have application here, because the statements that Henderson Brooke Deady made were contrary to his interest, because the statements that he made were that he only had a life estate, or a defeasible fee, and they were adverse to his interest, and if it is material what they were talking about, that she had an interest, she not only had an interest in showing that she had rights as a creditor, but that she had a dower interest, if she had an interest in fee. If she got a divorce from him, under the statutes she would be entitled to one-third of his two-thirds. So it is more than the rights of a creditor, and certainly it would be admissible either under a construction of the will or under his statements adverse to the title to the property.

Mr. Maguire: Certainly it is not what his title was, because his title is fixed by an instrument

(Testimony of Samuel B. Weinstein.)

which he had nothing to do with, the validity of which instrument is not in question. In other words, it is construing the intentions of the [79] testator, Lucy Deady. If Lucy Deady meant one thing, then he had a certain estate; if she meant something else he has a less estate. Now, his conclusions as to what she meant—and that is all this can be competent upon, because you can't divest his title, if it once vested in him under that will, by any action or statement which he ever made to anybody.

The Court: Now, I am just wondering about that, **whether that is true or not.**

Mr. Maguire: Well, I think without any question that that is the law, your Honor. The title can only be divested by conveyance.

The Court: Well, I am not so sure about that, either. I can still be convinced on that point. As I understand, statements of an ancestor in the construction of a deed of title can be introduced in evidence as against the successor, limiting his title, or saying that he does not claim a particular interest, where there is a possible ground to contest on.

Mr. Maguire: That can only come up as to boundary lines, as to where a boundary is, or about a question of an estoppel.

The Court: Well, I ask for your authority on that.

Mr. Maguire: Well, your Honor, I don't know

(Testimony of Samuel B. Weinstein.)

whether I have got the authorities here on that particular point.

The Court: I will take a recess while you are looking that up.

(A short recess was thereupon had, after which [80] proceedings were resumed as follows:)

The Court: The Court will receive testimony and reserve ruling.

The Witness: Will you read me the last question.

Mr. Jaureguy: Q. The question, as I recall, is the conversations that took place on those two occasions when Henderson Brooke Deady and Mr. Dolph were present.

A. Dr. Deady stated on both of those occasions, the substance of his statement was, that he had nothing under the will except a life estate with a power of appointment under will, by will, to a wife if he had a wife at the time of the last will of his. He stated further at the time that all that he was getting out of the property was some small income after certain other charges were being first made. That was the substance of his statement as far as negotiations were concerned.

Q. Did he say anything about possible children? You say you read the will. A. Yes.

Q. And it provides that if he died without issue the two-thirds should go to Hanover and Matthew Deady. Did he say anything about whether he had or would have any children?

(Testimony of Samuel B. Weinstein.)

A. Well, my recollection is that there were no children, he had no children. My recollection is that he was a man quite well advanced. He did not talk about future issue, as I recall.

Q. Now, was there anything said by Mr. Deady on those occasions, [81] or on either of those occasions, with respect to the circumstances, if any, under which he would exercise the power of appointment?

A. Yes, in these negotiations——

Mr. Maguire: We object to that as being wholly irrelevant to any issue in this case and wholly incompetent to prove or disprove any issue of the case.

The Court: The testimony will be received subject to objections. The Court will reserve ruling.

A. Yes, he suggested that if we could enter into a stipulation of the kind that he wanted to, that he would exercise the power in order to provide that Amalie B. Deady be given what he wanted to give her on a monthly income basis. The stipulation was in writing and, as I recall it, provided that he would make payments——

Mr. Maguire: (Interrupting) We submit that the document is the best evidence as to its contents.

Mr. Jaureguy: Q. Did he say how he could provide for her under the power of appointment if she wasn't his widow?

A. Well, I recall this suggestion, that he contemplated remarrying at that time and shortly after

(Testimony of Samuel B. Weinstein.)

this remarriage he would enter into—he would, in order to carry out this understanding, he would by last will and testament make this appointment under the will of Lucy A. H. Deady to his then wife; she in turn would enter into an agreement in writing that in consideration [82] of his exercising the power of appointment she would assume the obligation as a charge upon that power to pay out of the income the amount called for by the stipulation to be paid to Amalie B. Deady.

Q. Then as a result of those negotiations did you enter into a compromise settlement?

A. It finally resulted in a stipulation of a property settlement between the parties.

Q. Now, I wish to hand you Defendants' Pre-Trial Exhibit C and ask you whether included in that exhibit is a copy of that agreement?

A. Yes, that purports to be it.

Q. That is, the first couple of pages are of the complaint in the case of Henderson Brooke Deady against Amalie B. Deady, and then attached to that is an agreement. Is that the agreement that the parties entered into?

A. That is the agreement that the parties entered into.

Q. Did Amalie B. Deady agree to that?

A. Mr. Deady signed that and Amalie B. Deady signed it, executed in my presence and the presence of Mr. Dolph and the presence of Gertrude L. Mil-

(Testimony of Samuel B. Weinstein.)

liken, who was then my office stenographer. The signatures of Dr. Henderson B. Deady and Amalie B. Deady were acknowledged by me as a notary.

Q. And did you advise Mrs. Deady to sign it?

A. I did. [83]

Q. And in advising her did you rely on these statements that had been made to you by Henderson Brooke Deady respecting what interest, if any, he had in the real property?

Mr. Maguire: Just a moment. May I ask a preliminary question here to an objection?

The Court: Yes.

Mr. Maguire: You saw a copy of the will of Lucy A. H. Deady?

A. Yes, I did.

Mr. Maguire: Saw it before these negotiations were concluded?

A. Correct.

Mr. Maguire: Studied it?

A. Yes.

Mr. Maguire: Noted its provisions?

A. Noted its provisions, yes, sir.

Mr. Maguire: And the only conversation with regard to this particular subject matter was that which you have heretofore related?

A. Well, strictly speaking, Bob, there were a lot of conversations about that will with others than Henderson Brooke Deady and Chester V. Dolph.

(Testimony of Samuel B. Weinstein.)

Mr. Maguire: Well, I am talking about those with Henderson Brooke Deady.

A. That is all, on two occasions. [84]

Mr. Maguire: So what those contained and what the estate vested in him was, in your knowledge, irrespective of any statements that he or his attorney made with regard to the legal effect thereof?

A. Oh, I had independent knowledge of what I considered the will to be and what others considered the will to be. When I am saying others, I want to say in fairness to the situation that Mr. Hindman was a practicing lawyer, and Prescott Cookingham was, and they were attorneys involved in this situation with me, and when I say I talked with them, they were attorneys that were cognizant of the situation.

Mr. Maguire: I see. We object to the testimony as to whether or not he relied upon statements made either by Dr. Henderson Brooke Deady or Chester V. Dolph, upon the ground that the facts and circumstances upon which these statements could be based all arose out of the will itself, of which he had a copy and was cognizant and familiar with, and, therefore, the reliance is wholly immaterial and incompetent to prove any issue.

The Court: The ruling is reserved, dependent upon the other ruling.

Mr. Jaureguy: I take it that the witness may answer.

A. Will you restate the question, please.

(Testimony of Samuel B. Weinstein.)

(The last question propounded by counsel for defendants on direct was thereupon read, [85] as follows:

“And in advising her did you rely on these statements that had been made to you by Henderson Brooke Deady respecting what interest, if any, he had in the real property?”)

A. I would say that I was partially relying on their contentions and claims with reference to their interest under the will.

Mr. Jaureguy: Q. And pursuant to your advice Mrs. Deady signed that stipulation?

A. Correct.

The Court: Who do you mean by “their”?

Mr. Jaureguy: Who? Me?

The Witness: I meant his.

The Court: The witness uses the word “their”, “their contentions”. I want to know, who do you mean by “their contentions”?

A. “Their contentions”, I mean Henderson Brooke Deady and Chester V. Dolph.

Mr. Jaureguy: Q. Now I wish you would take that Defendants’ Pre-Trial Exhibit C again and look at the second paragraph contained in the stipulation, and I ask you if that is the paragraph that was intended to carry out the agreement that you had with respect to the power of appointment?

A. That is correct. That states the intention and the [86] provision that Henderson Brooke Deady

(Testimony of Samuel B. Weinstein.)

undertakes to exercise the power in order to make a charge upon that power of the amount required to be paid by him to Amalie B. Deady under this stipulation.

Q. Now, in your conversations with Henderson Brooke Deady and his attorney, Chester V. Dolph, was there any difference or inconsistencies between the representations that those two men made to you on what Henderson Brooke Deady got under this will?

A. None whatever. They were both claiming the same thing.

Q. And that complaint, as I understand, is signed by Chester V. Dolph as attorney for Henderson Brooke Deady? A. That is correct.

Mr. Jaureguy: We would like to offer Defendants' Pre-Trial Exhibit C in evidence.

DEFENDANT'S PRE-TRIAL EXHIBIT C

In the Circuit Court of the State of Oregon
for Multnomah County

HENDERSON BROOKE DEADY

Plaintiff

vs.

AMALIE B. DEADY

Defendant

Comes now the plaintiff above named and for cause of suit against the defendant above named alleges as follows:

(Testimony of Samuel B. Weinstein.)

I

That plaintiff now is and for more than one year last past immediately prior to the commencement of this suit has been an inhabitant and a bona fide resident of the County of Multnomah, State of Oregon.

II

That the plaintiff and the defendant lawfully intermarried at New York City, State of New York on or about the 30th day of May, 1902 and ever since said time they have been and now are husband and wife.

III

That ever since said marriage and during all the time herein mentioned plaintiff has been to the defendant an affectionate, true and faithful husband.

IV

That on or about March, 1910 at New York City, State of New York the said defendant, disregarding the solemnity of her marriage vows, wilfully and without cause, deserted and abandoned plaintiff and ever since has and still continues to so wilfully and without cause desert and abandon plaintiff and to live separate and apart from him without sufficient cause or any cause or reason and against his will and consent.

V

That there is no issue of said marriage, and the property rights of plaintiff and defendant have

(Testimony of Samuel B. Weinstein.)

been settled in accordance with a stipulation marked Exhibit "A" attached hereto and by reference thereto made a part hereof

VI

That said desertion of plaintiff by defendant remains uncondoned and unforgiven by him.

Wherefore plaintiff prays that the bonds of matrimony now existing between himself and defendant be dissolved and for such other and further relief as to this Honorable Court may seem meet and equitable.

CHESTER V. DOLPH

Attorney for Plaintiff

EXHIBIT "A"

In the Circuit Court of the State of Oregon
for the County of Multnomah

HENDERSON BROOKE DEADY

Plaintiff

vs.

AMALIE B. DEADY

Defendant.

STIPULATION AND AGREEMENT.

Whereas unhappy differences have arisen between the above named Henderson Brooke Deady and the above named Amalie B. Deady, his wife; and

(Testimony of Samuel B. Weinstein.)

Whereas, suit for divorce is about to be instituted in the above entitled Court by the said Henderson Brooke Deady against the said Amalie B. Deady; and

Whereas, the said parties to this agreement, to wit: the said Henderson Brooke Deady and the said Amalie B. Deady, his wife, in contemplation of the rendering and entering of a decree in said suit, have agreed between themselves as to a division and settlement of their property rights;

Now, therefore, provided and in the event that the Court shall grant a decree herein in favor of either party, dissolving the bonds of matrimony existing between the parties hereto, it is mutually agreed and understood;

1. That forthwith and with the entry of said decree the said Henderson Brooke Deady shall pay to the said Amalie B. Deady the sum of \$2500.00 in cash, and in addition to said cash payment the said Henderson Brooke Deady for himself, his heirs, executors and administrators further agrees to pay unto the said Amalie B. Deady, conditioned upon the entry of said decree, and for a period of twenty years thereafter monthly installments payable as follows:

(a) As and for the first day of September, 1925, and for a period of 11½ years from said date, the sum of \$75.00 per month, said installment to be payable on the first day of each month at such place and to the order of the said Amalie B. Deady

(Testimony of Samuel B. Weinstein.)

as she may direct; and for a period of 11½ years next following, the sum of \$100.00 per month payable on the first day of each month thereafter at the place and to the order of the said Amalie B. Deady as she may designate, and for the balance of said twenty year period, \$200.00 per month payable on the first day of each month in like manner to be designated by the said Amalie B. Deady; provided, however, that the said monthly payments herein provided for shall cease upon the death of the said Amalie B. Deady if same shall occur prior to the termination of the said twenty year period herein provided.

(b) The said herein Henderson Brooke Deady herein agrees, conditioned upon the entry of said decree as aforesaid, to forthwith make, execute and deliver to the said Amalie B. Deady, his promissory note payable to her order evidencing the obligation provided in the foregoing paragraph (a), said promissory note to be in the customary form excepting that it should be non-interest bearing, save in default of the payment of any installment when due, in which event said installment or installments shall bear interest from the respective dates of maturity thereof.

2. That said Henderson Brooke Deady hereby further expressly agrees in consideration of the settlement of the property interests of the parties hereto, always conditioned, however, on the entry of said decree, to exercise by his last will and testa-

(Testimony of Samuel B. Weinstein.)

ment, within one year from the entry of said decree the power of appointment contained in the will of Lucy A. H. Deady, deceased, of Portland, Oregon, mother of the said Henderson Brooke Deady, wherein the said deceased did give, devise and bequeath to the said Henderson Brooke Deady the undivided two-thirds of Lot numbered One (1), Block numbered Two hundred twelve (212), City of Portland, Multnomah County, Oregon, conditioned as in said will provided and wherein the said Lucy A. H. Deady authorized and empowered the said Henderson Brooke Deady, if he so elected, to bequeath by his last will and testament to his wife (if he then has a wife), the income that would have been derived to him, if living, from the two-thirds of said real property hereinbefore described; said bequest to continue, however, only during the lifetime of the widow of the said Henderson Brooke Deady; that he, the said Henderson Brooke Deady, does expressly agree to exercise the said power of appointment by his said last will and testament in such manner and to the effect that the payments herein provided to be paid by him to the said Amalie B. Deady shall be a fixed and prior charge upon the devise, estate, legacy or interest resulting from the exercise of said power by him. It being expressly agreed to exercise said power of appointment so that the beneficiary or appointee thereof shall receive and assume said devise, estate or interest or

(Testimony of Samuel B. Weinstein.)

bequest, charged with the condition upon the payment by said beneficiary or appointee, of all payments herein provided to be paid by the said Henderson Brooke Deady to the said Amalie B. Deady, and that this agreement shall create and constitute a lien and charge on said power and/or the interest acquired by said appointee or beneficiary thereunder for the purpose of securing the performance of the said Henderson Brooke Deady's obligations hereunder. And the said Henderson Brooke Deady hereby further expressly agrees to execute such other and further documents or agreements and/or to take any other step or steps necessary to legally effectuate the obligation herein agreed to be performed with reference to said exercise of said power of appointment by him.

3. The said Henderson Brooke Deady further agrees for himself, his heirs, executors and administrators, conditioned always upon the entry of said decree as aforesaid, to pay unto the said Amalie B. Deady or order, the sum of \$1500.00 on or before December 1, 1926, in full satisfaction and discharge of any and all counsel fee or fees incurred by her to date of decree, such sum to be evidenced by the promissory note of the said Henderson Brooke Deady bearing the date of entry of said decree payable on or before said December 1, 1926, bearing interest from date at the rate of seven per cent. per annum and containing the customary provision therein provided for the adjudging of reasonable

(Testimony of Samuel B. Weinstein.)

attorney's fees in case suit or action should be brought thereon to collect the same or any part thereof.

4. All the covenants, payments, stipulations, agreements and provisions herein contained shall apply to, bind and be obligatory upon the heirs, executors, administrators and assigns of the parties to this agreement whether so expressed or not.

It is further mutually understood and agreed by and between the parties hereto that this agreement shall have no force, and be binding upon neither of them excepting in the event of the decree of divorce dissolving the bonds of matrimony between them; that the Court may and shall embody and cover in its decree in said suit to dissolve said marriage the terms and provisions of this stipulation, and that the said Amalie B. Deady agrees to, and shall accept the said payment of \$2500.00 cash herein agreed to be paid her and the receipt of said promissory notes herein agreed to be executed and delivered to her in the manner and conditioned as herein provided, and the full and complete performance by the said Henderson Brooke Deady of each and every other covenant and obligation hereinabove agreed to be performed by him, as and for the full, satisfactory, reasonable and sufficient settlement of all claims of every nature whatsoever which she now has against the said Henderson Brooke Deady.

(Testimony of Samuel B. Weinstein.)

In witness whereof the parties hereto have hereunto set their hands this 14th day of September, 1925.

(Sgd) HENDERSON B. DEADY

HENDERSON BROOKE DEADY

(Sgd) AMAILE BUSCK DEADY

Executed in the

Presence of Witnesses:

(Sgd) CHESTER V. DOLPH

(Sgd) SAMUEL B. WEINSTEIN

(Sgd) GERTRUDE L. MILLIKEN

State of Oregon

County of Multnomah—ss.

On this 14th day of September, 1925, before me a notary public in and for said county and state, personally appeared the within named Henderson Brooke Deady who is known to me to be the identical individual described in and who executed the within instrument and acknowledged to me that he executed the same freely and voluntarily.

In testimony whereof, I have set my hand and official seal hereto the day and year last above written.

(Seal)

(Sgd) SAMUEL B. WEINSTEIN

Notary Public for Oregon

My commission expires Dec. 11, 1926.

(Testimony of Samuel B. Weinstein.)

State of Oregon

County of Multnomah—ss.

On this 14th day of September, 1925, before me a notary public in and for said county and state, personally appeared the within named Amalie B. Deady who is known to me to be the identical individual who is described in and who executed the within instrument and acknowledged to me that she executed the same freely and voluntarily.

In testimony whereof, I have set my hand and official seal hereto the day and year last above written.

(Seal) (Sgd) SAMUEL B. WEINSTEIN

My commission expires Dec. 11, 1926.

State of Oregon,

County of Multnomah—ss.

I, Henderson Brooke Deady being first duly sworn, do depose and say that I am the plaintiff in the above entitled suit; and that the foregoing complaint is true as I verly believe.

HENDERSON BROOKE DEADY

Subscribed and sworn to before me this 15th day of September, 1925.

(Seal) CHESTER V. DOLPH

Notary Public for the State
of Oregon.

My commission expires.....

State of Oregon

County of Multnomah—ss.

Due service of the within Complaint is hereby accepted in Multnomah County, Oregon this 15th day of September 1925, by receiving a copy thereof, duly certified to as such by Chester V. Dolph, Attorney for Plaintiff.

(Seal)

STANLEY MYERS

District Attorney for Mult. Co., Or.

By SAM'L H. PIERCE

Deputy.

State of Oregon,

County of Multnomah—ss.

I, A. A. Bailey county clerk and ex-officio clerk of the Circuit Court of the state of Oregon for the county of Multnomah, a court of record. Do hereby certify that the foregoing copy of Complaint and Exhibit (Henderson Brooke Deady, Plaintiff, vs. Amalie B. Deady, Defendant) No. L-3801 has been compared by me with the original and that it is a correct transcript therefrom, and of the whole of such original Complaint and Exhibit as the same appears on file in my office and in my custody.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, this 6th day of May, A. D. 1940.

A. A. BAILEY

County Clerk

By MARY DUNKIN

Deputy

[Endorsed]: Filed Feb. 21, 1942.

(Testimony of Samuel B. Weinstein.)

The Court: I think this all depends upon the pending question, the ruling on which is reserved.

Mr. Grant: May it be understood that we do have a continuing objection to all of this, both the statements and the result of his conversation?

The Court: I assume that is correct. I was ruling on that basis.

Mr. Jaureguy: You may take the witness.

Cross-Examination

By Mr. Maguire: Q. Mr. Weinstein, when did you first know of [87] or see a copy of the will of Lucy A. H. Deady?

A. I saw it sometime during the negotiations, or even prior to the negotiations. I saw it sometime after June of 1925, when the attorneys representing Mrs. Deady received a communication from Webb, Petterson & Hadley, of New York.

Q. Was a copy of the will transmitted with those communications?

A. I cannot say definitely, but in my files of some fifteen years ago, some seventeen years ago, I found some copies of wills.

Q. Some copies of wills?

A. Of the will of Lucy A. H. Deady. Whether it was procured here or transmitted by Webb, Petterson & Hadley I cannot tell.

Q. Their letters to you do not state whether or not they are enclosing a copy of the will?

A. No, they do not; that is, in the part that I

(Testimony of Samuel B. Weinstein.)

have in my files. I might explain, in that connection, that Mr. Prescott Cookingham had a file, Mr. Charles C. Hindman had a file, and I had a file, and all I can discover from my files is just portions of correspondence that we had with Webb, Pettersson & Hadley. Some of them are missing.

Q. Well, it is a fact, is it not, Mr. Weinstein, that you had a copy or had examined a copy of the Lucy A. H. Deady will prior to the time that these negotiations and conversations [88] that you mention took place?

A. That is correct.

Q. And did you and your co-counsel examine the will? A. I think we did.

Q. So that when Chester Dolph or Dr. Deady talked with you you knew as much about the contents of the will as anyone did, didn't you?

A. As prior to Chester Dolph's talking to me?

Q. I say, at the time they talked to you you knew as much of the contents of the will as anybody else did?

A. Well, I think I did. I construed the will to the best of my ability.

Q. Have you with you the correspondence which you mention there with the Petterson Company?

A. I have all the file that we have.

Q. Have you any objection to my looking at it?

A. Not at all. You are welcome to it.

Mr. Maguire: Thank you.

(Counsel for plaintiff then examined said file.)

(Testimony of Samuel B. Weinstein.)

Mr. Maguire: Q. Now, the situation between yourself, representing Mrs. Deady, Mrs. Amalie Deady, and Chester V. Dolph, representing Dr. Henderson Brooke Deady, and the Doctor was simply this, that you were endeavoring to get as much for your client and they were endeavoring to pay as little?

A. That is a correct assumption. [89]

Q. And you were dealing at arm's length, were you not? A. Correct.

Q. And you did not rely upon their statement of the provisions of the will, did you?

A. Well, now, to answer that question, I think I would like to explain it. Now, you say "rely". Whether I absolutely, without any knowledge of my own, relied solely upon what they said, no, I did not rely solely on what they said, but in negotiations in matters of this kind it is reasonable and ordinary for persons to listen to their contentions, which I did, and that was their contention, and, coupled with their contention, the phrasing of the will, my investigation from other sources led me to believe that the best deal I could make was embodied in the stipulation.

Mr. Maguire: And may I have Exhibit C for a moment.

Q. Now, there was no provision made in the stipulation agreement, which you state was executed by the parties, whereby—withdraw that ques-

(Testimony of Samuel B. Weinstein.)

tion. Was there ever any other writing passed in or executed by the parties, or by Charlotte Howell Deady, made at or about the time this settlement was entered into?

A. None that I recall.

Mr. Maguire: That is all, thank you.

Redirect Examination

By Mr. Jaureguy: Q. Now, this paragraph 2 of the stipulation, which, as you say, was intended to [90]

carry out the agreement of Charlotte making the agreement, and so on, did you have any particular reason for not detailing the exact mechanics of that in the stipulation?

Mr. Maguire: May it please the Court, where negotiations have resulted in a written contract, testimony of this kind is wholly inadmissible and incompetent, under the statute.

The Court: That is correct. The objection is sustained, unless it involves a statement or construction of the will of Lucy A. H. Deady by Dr. Deady.

Mr. Jaureguy: Well, it does not—

The Court: (Interrupting) If there is some conversation of that sort, I don't care what it is—

Mr. Jaureguy: (Interrupting) Well, the conversation has been given, and counsel's statement seems to indicate that the stipulation is inconsistent with the conversation, and that is why I want to ask him why the matter in the conversation was

(Testimony of Samuel B. Weinstein.)

not put in so many words in the stipulation. Now, counsel's statement of the parol evidence rule has no effect in this state where strangers to the agreement are involved; our Supreme Court has held that many times. But, further than that, we are not offering that for the purpose of changing or in any way modifying the stipulation, but merely giving a reason why certain agreements were not put in the stipulation in the exact words in which the witness' statement is made. [91]

The Court: Well, he can testify, put it in the record.

Mr. Jaureguy: You say he can put it in the record? The Court: Yes.

A. I take it that the stipulation does not state the intention of Dr. Deady to remarry and then to exercise his power under the will to his future wife, Mrs. Charlotte Deady. The reason I thought that was that I thought it was against public policy to put any such stipulation in the document and any contemplation of marriage. I thought it better to keep it out.

Mr. Jaureguy: Q. Now, you brought in conversations with Mr. Cookingham and Mr. Hindman had on this matter. Did Mr. Cookingham have anything to do with these negotiations? I mean in talking with Dr. Deady or with Mr. Dolph?

A. I can't say for certain whether he did or not. I know we had conferences. Whether he did carry on independent negotiations or conferences

(Testimony of Samuel B. Weinstein.)

with Dr. Deady I could not say. I know that he did transmit whatever I had concluded to the correspondent attorneys in New York, Webb, Petterson and Hadley.

Q. Was he present at any of these conversations had with Mr. Dolph or with Dr. Deady?

A. I don't think so.

Q. And did Mr. Hindman have any such conversations?

A. I think Mr. Hindman had a number of conversations with both of these parties, but I was not present at any of those. I carried them on independently of the others and [92] I reported in writing from time to time the progress that was being made.

Q. Yes. And Mr. Hindman is now dead?

A. Yes.

Mr. Jaureguy: That is all.

Recross Examination

By Mr. Maguire: Q. I don't know that I quite understand, Mr. Weinstein, what matter of public policy you thought was involved there.

A. Well, do you want me to answer that, Bob?

Q. Yes, I wish you would.

A. Well, Dr. Deady, at that time, if it is not known to you, had abandoned Amalie B. Deady. He had been at least interested in some other woman. It was that woman that he intended to marry after this divorce was obtained. I thought the whole

(Testimony of Samuel B. Weinstein.)

problem presented itself as a sort of a public policy that was not very dignified, to say the least, of his conduct at that time, and I did not want to insert it in the agreement.

Q. Well, now, what public policy and what didn't you want to insert in the agreement?

A. I did not want to say in the agreement that as consideration for this stipulation he agrees to marry this woman and that he will agree when he marries this woman to exercise his power of appointment under the last will and testament of his mother, Lucy A. H. Deady. I thought it was not proper and [93] should not be inserted, and left it open to him if he—you will notice that he agrees to exercise that power within one year. My information was that he intended to marry her very quickly after that.

Q. Well, why did you think it as against public policy?

A. Well, I consider it as against public policy as a matter of law.

Q. In what respect?

A. I think that a divorced person cannot marry within the state of Oregon within a period of time. My information was that he was about to marry pronto.

Q. You mean within the six-month period?

A. Yes.

Q. What would his contract or agreement that he would have with such wife as he should have to

(Testimony of Samuel B. Weinstein.)

make a binding agreement, what would there be against public policy in that?

A. Well, not at all. That is why it states that and nothing else.

Q. Did this contract state that his wife should do it?

A. Yes, he provides that the appointee should make that agreement.

Q. But you did not obtain any such promise from the prospective spouse?

A. No, I did not.

Q. And in submitting this agreement to the Court and having it [94] approved by the Court you did not tell the Court anything about this understanding or this relationship which you state is against public policy?

A. Well, if you want to know the truth about it, I so disclosed all of the facts to the Court.

Q. Though it was not in the stipulation?

A. All of the facts, including the conduct of Dr. Henderson Brooke Deady, who started the divorce suit.

Q. So that, though not in the stipulation, you told the Court about it anyway?

A. Exactly.

Mr. Maguire: That is all.

Further Redirect Examination

By Mr. Jaureguy: Q. Well, now, did Dr. Deady and Mr. Dolph agree with that conclusion, that his plans about marrying this woman and the aban-

(Testimony of Samuel B. Weinstein.)

donment and things should not be in the stipulation?

A. He insisted that it should not be inserted in there. He didn't want the world to know about his wife.

Q. Who is "he"?

A. I am talking about Dr. Henderson Deady.

Mr. Jaureguy: That is all.

Mr. Maguire: That is all, thank you. [95]

Wednesday, January 22, 1941, at 10:30 o'clock A. M., the trial of the above entitled cause was resumed, as follows:

The Court: You may proceed, Gentlemen:

Mr. Maguire: Plaintiff at this time renews his objection to the receipt of the Exhibit Defendants' Exhibit C and to the testimony of the witness Weinstein and moves that the testimony of the witness Weinstein with regard to investigations had, all of his testimony in regard to the conversations and negotiations, acts and things done and had with Henderson Brooke Deady and Chester V. Dolph be stricken from the record, on the grounds mentioned in our objections to the receipt of the testimony and exhibit; and the further ground that it is incompetent inasmuch as it tends to diminish or impeach the title or estate of Henderson Brooke Deady under the will, which could not be done by parol proof. Offhand, it would be a remarkable thing if oral declarations of anyone could change the nature and extent of an estate granted or given under a

(Testimony of Samuel B. Weinstein.)

deed or any other document which falls within those statutes requiring it to be in writing or to be authenticated, witnessed or otherwise in a particular way or manner, and that, as our research indicates, is the law, that it cannot be done. [97]

The Court: We are not making much progress with this. I am somewhat still in doubt, although, as I said last night, even after hearing the arguments, I am somewhat still in doubt as to the question of admissibility. Offhand I thought it was admissible, and I am rather inclined to view that way since. However, I think that I will have to change my procedure, because otherwise we are going to exhaust all this time that I have laid out for this case in argument, and I think that I will go ahead and take the testimony, all the testimony, under objection and I will rule when I come to make the decision. We are going to have the whole record in this case anyhow, because I have made up my mind all the testimony should go into the record whether [143] I admit it or exclude it, and I think that I will allow you to make your objections and take the testimony under the objection, and then when I decide the case I will rule *seriatim* on the objections, if that is not objectionable. If anyone wishes to object to that proceeding, why, I will try to consider these questions as we go along and rule definitely at this time .

Mr. Jaureguy: That is fine.

Mr. Maguire: Fine with us.

(Testimony of Samuel B. Weinstein.)

Mr. Jaureguy: Then we won't have to bring all these books back. What I say, we can rely on it that we are not going to argue on these questions as to the admissibility involved, because I gathered from his argument that there might be another bit of evidence on which—

The Court: (Interrupting) I think I would like to hear you as we go along, gentlemen.

Mr. Jaureguy: On the admissibility?

The Court: Yes, on the admissibility, but I think I won't make definite rulings at the time, but I think while we are here we ought to consider these questions together and raise and argue objections, but I think that I probably won't rule upon them and still receive them subject to the objections. I want to proceed very carefully in this case and not consider myself bound by rulings that I will subsequently sustain or that I won't want to sustain after a complete review of the authorities.

If there is nothing further, the court is in recess [144] until two o'clock.

(Whereupon, at 12:15 o'clock P. M., Wednesday, January 22, 1941, a recess was had until 2:00 P. M.)

Afternoon Session 2:08 P. M.

The Court: You may proceed, gentlemen.

Mr. Jaureguy: Call Mr. Hanover Deady.

HANOVER DEADY,

one of the defendants herein, was thereupon produced as a witness in behalf of defendants:

The Clerk: State your name, please.

A. Hanover Deady.

(The witness Hanover Deady was thereupon duly sworn and was examined and testified as follows:)

Direct Examination

By Mr. Jaureguy: Q. Your name is Hanover Deady? A. That is right.

Q. And you are one of the defendants in this case? A. Yes, sir.

Q. And how long have you lived in Portland?

A. I have been a resident here all my life.

Q. And how old are you?

A. I will be forty-nine this year; forty-eight now. [145]

Q. And what relation were you to Lucy A. H. Deady? A. Grandson.

Q. And your father's name was what?

A. Edward; Edward Nesbit Deady.

Q. And how many sons did your grandmother have? A. Three sons.

(Testimony of Hanover Deady.)

Q. And who were the other two?

A. Paul R. Deady and Henderson Brooke Deady.

Q. And your father died when?

A. Around about 1913 or '14.

Q. And when did Paul Deady die?

A. In 1920, in March.

Q. So that after March, 1920 the situation with respect to the descendents of Lucy A. H. Deady, as I understand it, was that she had one son, Henderson Brooke Deady, living?

A. That is right.

Q. And did you have any brothers or sisters?

A. I didn't hear the question.

Q. Did you have brothers or sisters?

A. I had one brother, Matthew.

Q. And, therefore, she had that one son and two grandsons?

A. That is right.

Q. Paul left no children?

A. Paul had no children, left no children.

Q. And did he leave a widow? [146]

A. Yes, he left a widow.

Q. And what was her name?

A. Marye Thompson Deady.

Q. That is (spelling) M-a-r-y-e?

A. That is right.

Q. Now, during your early youth and childhood did you ever have occasion to visit with your grandmother?

A. Oh, yes, I visited with her quite frequently.

(Testimony of Hanover Deady.)

Q. What would be the occasions for those visits?

A. Well, she was my grandmother. I went up to see her, enjoyed being with her.

Q. Now, are you married?

A. Yes.

Q. And when were you married?

A. June 1st, 1925.

Q. Was your grandmother acquainted with the lady that you later married?

A. Yes, she was.

Q. And how long had she known her?

A. Well, she knew her for quite a while, several years before we were married. I would say she knew her in 1920, at least, sometime before that.

Q. How long had you and your present wife been engaged before you were married?

A. I don't know how long we were engaged, but I knew her when [147] she was fourteen and I was seventeen. We went together, off and on, all the time.

Q. For the purpose of the record, the lady you married in 1925 is still your wife?

A. That is right.

Q. And that is the one that you say you have known ever since you were seventeen?

A. That is right.

Q. And what would you say as to whether you and she were engaged to be married before July, 1920?

A. Well, we always had that understanding.

Q. Well, that is what "that understanding" means?

A. Yes.

(Testimony of Hanover Deady.)

Q. Now, during the lifetime of your grandmother did she ever discuss with you her property?

Mr. Maguire: Object to the question because it is irrelevant and immaterial.

The Court: He may answer.

A. Yes, she did.

Mr. Jaureguy: Q. And during those discussions did she ever discuss what she desired to have done with that property?

Mr. Maguire: Object upon the ground as incompetent to prove any issue in this case.

The Court: Preliminary. I will permit the answer. A. Yes, she did. [148]

Mr. Jaureguy: Q. I wish you would just relate, giving us, as nearly as possible, the times and places, the conversations you had with her in which she discussed the matter of what she desired to be done with this property.

Mr. Maguire: We offer the same objection, that it is incompetent to prove the intent of the testator,—that has to be determined by the construction of the document which she executed as her last will and testament—and that it is incompetent, irrelevant and immaterial to any issue of this case, and—well, I will submit the objection first, this objection.

The Court: I do not understand that he has asked for anything except the times of the conversations.

Mr. Jaureguy: No, I asked him to give the conversations, giving the times as nearly as possible.

(Testimony of Hanover Deady.)

The Court: Well, do you wish to argue this? I may say, offhand, before that, that I think this line of testimony is entirely incompetent.

Mr. Jaureguy: While I want to follow your Honor's desires with respect to procedure, I do not want to have it excluded without argument, but if your Honor either takes it subject to reservations or otherwise, why, I will just follow whatever procedure your Honor wants. I would want to argue it. I would want to argue twenty minutes or such a matter.

The Court: Well, at this time I will take it subject to the objections. [149]

Mr. Jaureguy: And then at any time your Honor cares to have me argue it I will be glad to present that.

The Court: Yes.

Mr. Jaureguy: Q. Do you remember the question?

A. No, I would like to have it read.

(The last question was thereupon read.)

A. Well, she spoke of the property to me several times, several places.

Q. You say "the property". You are referring now to what property?

A. I am referring to the property involved in this case—that is the property at Broadway and Alder Street—but there was only—the time that she really explained the situation to me, explained her will to me, was shortly after Uncle Paul died

(Testimony of Hanover Deady.)

and after the time she had made her will. I was up to her apartment at the Alexandra Court, and she made the statement to me then that she had finally gotten her affairs settled and went into detailed explanation as to what she had done in drawing up her will.

Q. Well, prior to that time had she ever discussed her property and what her desires were with respect to the property?

A. Well, yes, she had told us, Matthew and I, especially myself, that—

Mr. Maguire: (Interrupting) Pardon me, just a moment. May it be understood that our objections to this testimony [150] relating to conversations with or statements made by Lucy A. H. Deady with regard to her property, how she intended to dispose of it, how she had disposed of it, and any of those matters, that our objection may run to all of these, without the necessity of interrupting each time?

The Court: Yes.

Mr. Jaureguy: Q. Just proceed.

A. She had spoken of the property in several instances before that time, saying and stating that we had nothing to worry about, referring to my brother and I, that she was going to leave us the property some day. Several times, even when Uncle Paul was alive, she spoke that way, but this was the only time that she had ever gone into—

(Testimony of Hanover Deady.)

Q. (Interrupting) Well, before you go into that, did she, in any of her conversations, ever discuss your Uncle Henderson? Before we come to that, was your Uncle Henderson living here at that time?

A. Oh, no, Uncle Henderson was in the East. He didn't come out here until—I don't mean to say he hadn't been here at some past time, but I mean to say he did not come out here until after Uncle Paul died.

Q. Well, do you know whether he was living apart from his wife at that time?

A. Did I know that?

Q. Yes. [151]

A. Oh, yes, I knew that.

Q. And did your grandmother know that?

A. Oh, yes, she knew about it.

Q. And did she ever say anything about it?

A. Oh, yes, she—

Mr. Maguire: (Interrupting) May we have the same objection, your Honor, as wholly incompetent, in regard to this matter? It seems to be a little foreign to the other matter.

The Court: You can have a general and continuing objection to all these statements of Lucy A. H. Deady.

Mr. Maguire: Very well. Thank you.

A. Yes, she spoke to me about the conditions or the situation back there, that Henderson wasn't living with his wife, and what the situation was entirely.

(Testimony of Hanover Deady.)

Mr. Jaureguy: Q. What did she say as to what the situation was?

A. Well, she seemed to be quite upset, or was quite upset, with the fact that Henderson was not living with his wife. That is about as much as I can remember of it.

Q. Now, did she ever, in any of these conversations about this property, did she ever say anything about what Henderson would get in the property, or what she desired him to have, or what she desired Paul to have?

A. She never told me what she desired Paul to have that I can remember, but she did tell me what she desired Henderson to have. That was after Paul had died, however. [152]

Q. And what did she say?

A. She told me, to my best recollection, in her apartment, that she had made out her will so that Matthew and I would come into the property some day, that she had left a certain portion of the property to Henderson if he had children, otherwise Matthew and I were to have all the property, and she then said, "However, Henderson will never have any children. He is a sick man and I know that he can't have any children." She also explained to me the reason that she put it that way, because—in the will that he should have the property if he had children, because he was her son and she thought it was only fair and right to put it that way in the will, but she never——

(Testimony of Hanover Deady.)

Q. Well, why, did she say?

A. Well, as I understood it, that she thought it was the proper thing to do, but she did not expect him to ever have any children. The fact of the matter is, she drew to my attention at that time that he was living apart from his wife; made the statement, too, that she hoped that his wife would never give him a divorce, that he expected to remarry and she hoped that he wouldn't remarry.

Q. She said that she hoped that he would remarry?

A. Hoped that Amalie would never give him a divorce so that he could remarry.

Q. Now, how far back would you say these conversations went in which she spoke about what she wanted done with this [153] property?

A. Well, I wouldn't be able to tell you, because she didn't really say anything definite to me while Uncle Paul was alive, except the general statement that we had nothing to worry about, that Matthew and I would come into the property some day, but this other—

Q. (Interrupting) Well, how far back did that go?

A. Well, I say I couldn't say definitely. Some time back.

Q. Some time back prior to Paul's death?

A. Oh, yes.

Q. What were the occasions on which she would make those remarks?

(Testimony of Hanover Deady.)

A. Well, I don't know. I just—we would go up there and see her, or I would go up there and see her alone. I think she enjoyed our company. I know I did hers.

Q. Well, would you be talking about finances, or what would you be talking about that would bring up the subject?

A. Oh, nothing particular. I—I can't account for it, except that she did make those statements.

Mr. Jaureguy: Now, up to this point it has been taken with objections, reserving objections to all of this, but I want to say that we are going onto another subject now, and if counsel wants it subject to the objection I think he had better make it.

The Court: Yes, he probably will.

Mr. Jaureguy: Q. Now, subsequent to the death—You remember [154] when your grandmother died?

A. Yes.

Q. And was Henderson here when she died?

A. No.

Q. Did he come here after she died?

A. He came out after she died—no, I beg your pardon; he was here before she died, about six or seven weeks before she died.

Q. And how long did he stay?

A. Well, he stayed at least a year.

Q. And was he here after that year? What I mean to say, you say he stayed at least a year. Did he go and stay away then, or was he back and forth?

A. Well, the length of time that he stayed here,

(Testimony of Hanover Deady.)

whether it was a year, or a year and six months, why, when he left he didn't come back, he was away indefinitely.

Q. Now, after she died, did you read the will?

A. Yes, sir; it was read to me and Uncle Henderson and Matthew in Joseph Simon's office.

Q. Now, after she died did you have any conversations with Henderson with respect to the distribution of the income from this property?

A. Yes, I did.

Q. And did you find occasion to consult a lawyer about it? A. Yes, I did.

Q. And whom did you consult? [155]

A. Ralph Wilbur.

Q. And was that shortly after your grandmother's death?

A. Well, it was within two or three months, I should judge, something like that.

Q. Now I wish you would state the conversations you had with Henderson with respect to the distribution of the income from this property.

The Court: I wish that you would amend that question, Mr. Jaureguy, in order to have it clear-cut, and have him give the time and place of the conversation, so far as he can remember, and persons present, so we can have it a little more clearly-cut as to what that was.

Mr. Jaureguy: Q. Now, you say you had such conversations. Do you recall the time and place where they took place?

(Testimony of Hanover Deady.)

A. Well, I don't recall the exact time, except that it was two or three months after Grandmother had passed away. I can't name any definite places, except one or two, because it was a kind of a carrying on of the conversation. For instance, up at his hotel, at one time, where he stayed, at the Weaver Hotel, and at the Hazelwood for lunch one time, and various places that way.

Q. And over what period of time did these conversations continue?

A. Well, the only way I can explain that is to tell what the conversations were about; what I mean to say is that he was [156] leading up to—

Mr. Maguire: (Interrupting) Now, just a moment. Now, if you are about to go into the question of the conversations I shall ask leave to submit an objection. We object to this upon the ground that it is wholly incompetent, not binding upon the plaintiff to this action, not binding upon plaintiff's predecessor, as to any estate or interest in the property, wholly hearsay, and therefore wholly incompetent, irrelevant and immaterial to any issue in this case, and not tending to prove or disprove any issue in the case.

The Court: The Court will reserve ruling and take the testimony.

Mr. Jaureguy: Now, inasfar as it is possible—

Mr. Maguire: (Interrupting) Pardon me, just a moment—and may it be understood that as to

(Testimony of Hanover Deady.)

these conversations with Henderson Brooke Deady our objection may run to each and every question and answer without the necessity of taking up the time to repeat it each time?

The Court: You may have a general and continuing objection to all declarations by Henderson Brooke Deady.

Mr. Maguire: Thank you, sir.

The Court: Proceed.

Mr. Jaureguy: Q. Insofar as it is possible, we want you to state the time and place and persons present, and any other circumstances that will serve to identify the conversations. [157] Now, with that admonition, I wish you would state what these conversations were, what he said, and the occasions that gave rise to these conversations.

A. Well, that is pretty hard to do, it was quite sometime ago, but, as I stated before, that I saw him at various places,—I used to go out for a ride with him occasionally, I saw him at his hotel, and ate lunch with him quite frequently, and it was at those places that he would talk to me about the property and what he wanted done, and at these various places he kind of lead up to finally what he did ask me for, that he needed some money, wanted some money to live off of, he had no other means to live, and he said he had spoken to Joseph Simon about getting some money and Mr. Simon said that it would be all right if he got the consent of Matthew and I. And he explained to me that the reason he

(Testimony of Hanover Deady.)

wanted the money was because he couldn't get the money at the present time, and the reason he wanted us to consent to get the money was because he couldn't get any money at the present time, inasmuch as under the will the moneys had to be paid out for a sinking fund and inheritance taxes, and so forth, was what they all were, that he had to wait, unless he got Matthew's and my consent to that, to get some money. I—so I said that I went down to Mr. Simon's office and asked him about it—

Q. (Interrupting) No, but I want to ask you whether he put up any arguments why you should give the consent that he could [158] have the money, even though under the will he was not entitled to it?

Mr. Maguire: Why, just a moment—the witness has not yet so testified.

The Court: Yes, I think maybe the witness had better testify.

Mr. Jaureguy: Well, he just related the obstacles to getting money under the will at the outset.

The Court: Well, I would just as soon let the witness testify.

Mr. Jaureguy: That is what I want to.

The Court: Let him relate the different conversations there were, the times and circumstances, so we will see his testimony in the record.

Mr. Jaureguy: All right.

A. Yes, Henderson did put up the proposition to me that he was a sick man, that he needed the money, and, as I explained before, that, why, he

(Testimony of Hanover Deady.)

couldn't get it unless he could get Matthew's and my consent, and he also expressed that inasmuch as Matthew and I were coming into the property some day ourselves, why, he thought it was only fair that he should get something to live off of, and—

Q. (Interrupting) Well, did he elaborate on why you were coming into the property?

A. Oh, yes, he said that "I can't come into the property unless [159] I have children, as you know, and I will never have any children, because I am a sick man, I can't have children."

Q. Now, did you make any agreement with him whereby he was to get income?

A. Yes, I signed a stipulation.

Mr. Jaureguy: I wonder if we could have the pre-trial exhibits. Handing you Defendants' Pre-Trial Exhibits I and J, I wish you would just look at those and explain what they are.

Mr. Maguire: They speak for themselves, do they not? I have no objection to the witness identifying the documents as to the signatures or otherwise, although, as I understood it, our pre-trial order covered the matter of identification.

Mr. Jaureguy: I will withdraw the question and ask another one, and then you can object to that.

Mr. Maguire: Very well.

Mr. Jaureguy: Q. Are those the stipulations that you referred to a few moments ago that you signed?

A. That is correct.

(Testimony of Hanover Deady.)

Q. Now, those are dated December, 1923, and, as I recall, October, 1924.

A. That is right.

Mr. Jaureguy: I offer those two stipulations in evidence.

Mr. Maguire: We now move that all the testimony of the witness heretofore given with regard to conversations between himself and Henderson Brooke Deady relating to and which [160] culminated in these stipulations be stricken upon the ground that it, being the preliminaries to an agreement, they have merged, the agreement takes their place, and they are not competent.

The Court: You are moving to strike out the previous testimony and then objecting to the exhibits. I take it?

Mr. Maguire: Well, I am moving first as to the previous testimony. I am not yet objecting to the exhibits. I will do that as soon as your Honor has ruled on the—

The Court: (Interrupting) The motion to strike is presently denied. The testimony will remain in the record, subject to the objection. The documents are received, subject to the objection.

Mr. Maguire: Well, I have not yet made an objection to the exhibits. My objection to the exhibits in question is that they are wholly incompetent and irrelevant to prove any issue in the case, to prove testamentary intent of Lucy A. H. Deady,

(Testimony of Hanover Deady.)

or to bind in any way Henderson Brooke Deady, or to bind in any way the plaintiff in this action, wholly incompetent to vary, diminish or impeach the title of Henderson Brooke Deady under the will of Lucy A. H. Deady.

The Court: Received in the record, subject to the objection. The Court will subsequently rule as to whether they are in evidence or received under the rule.

(Certified phostatic copy of stipulation, Lucy A. H. Deady estate, dated December 18, 1923, [161] executed by Joseph Simon and Henderson Brooke Deady, Executors, and Henderson Brooke Deady, Hanover Deady, Mary E. Deady, Matthew Edward Deady and Marye Thompson Deady, so offered and received, having previously been marked as Defendants' Pre-Trial Exhibit I, was thereupon marked received subject to objection, ruling reserved; and

Certified phostatic copy of stipulation, Lucy A. H. Deady Estate, dated October—, 1924, executed by Hanover Deady, Matthew E. Deady, Mary E. Deady; Joseph Simon, Henderson Brooke Deady, Executors; Henderson Brooke Deady, and Marye T. Deady, so offered and received, having previously been marked as Defendants' Pre-Trial Exhibit J, was marked received subject to objection, ruling reserved.)

(Testimony of Hanover Deady.)

DEFENDANT'S PRE-TRIAL EXHIBIT I

In the Circuit Court of the State of Oregon
for the County of Multnomah
Probate Department.

In the Matter of the Estate of LUCY A. H.
DEADY, Deceased.

STIPULATION

Whereas the last will and testament of said deceased, now being probated in the above proceedings, makes provision for the payment monthly of certain sums of money to Henderson Brooke Deady, Matthew Edward Deady, Hanover Deady, Mary E. Deady and Marye Thompson Deady; and

Whereas a controversy exists as to whether or not the estate of said deceased shall be distributed as by said will directed and as to the ownership of the real estate known as Lot One (1) in Block Two Hundred and Twelve (212) in the City of Portland, and included within the terms of said will; and

Whereas it is the desire of all of the parties to this stipulation that monthly payments may be made by the Executors of said estate in their discretion out of the funds of said estate during the pendency and until the determination of such controversy;

Now therefore it is hereby mutually stipulated, understood and agreed by and between the parties hereto that the said Executors may in their discretion beginning as of date of December 1, 1923, pay,

(Testimony of Hanover Deady.)

of the sums of money directed by said will to be paid to the beneficiaries hereinafter named and each of them, and out of the funds of said estate, to Henderson Brooke Deady \$300.00 per month, Matthew Edward Deady \$100.00 per month, Hanover Deady \$100.00 per month, Mary E. Deady \$150.00 per month and to Marye Thompson Deady \$75.00 per month; without prejudice to the right of said parties or any of them in said controversy or in or to said estate, or any part thereof, and without prejudice to the contentions made, or to be made, by any of the parties as to the title of said Lot One (1) in Block Two Hundred and Twelve (212) City of Portland, and without prejudice to the rights of the Executors of said estate in the premises.

Dated at Portland, Oregon, this 18th day of December, 1923.

JOSEPH SIMON

HENDERSON BROOKE DEADY

Executors

HENDERSON BROOKE DEADY

HANOVER DEADY

MARY E. DEADY

MATTHEW EDWARD DEADY

MARYE THOMPSON DEADY

[Endorsed]: Filed Dec. 19, 1923 Jos. W. Beveridge, Clerk F. O. McGrew, Deputy.

(Testimony of Hanover Deady.)

State of Oregon,

County of Multnomah—ss.

I, A. A. Bailey, County Clerk, Ex-Officio Recorder of Conveyances and Ex-Officio Clerk of the Circuit Court of the State of Oregon, for the County of Multnomah, which Court has exclusive jurisdiction of all probate proceedings in said County, do hereby certify that the foregoing copy of Stipulation in the Matter of the Estate of Lucy A. H. Deady, Deceased, Est. No. 22735 has been compared by me with the original, and that it is a correct transcript therefrom, and of the whole of such original Stipulation as the same appears on file in my office and in my custody.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, this 15th day of May, A. D. 1940.

(Seal) A. A. BAILEY,
County Clerk.

By E. L. FERGUSON
Deputy.

[Endorsed]: Filed Feb. 21, 1942.

(Testimony of Hanover Deady.)

DEFENDANT'S PRE-TRIAL EXHIBIT J

In the Circuit Court of the State of Oregon
for the County of Multnomah.

Probate Department.

In the Matter of the Estate of LUCY A. H.
Deady, Deceased.

STIPULATION

It is stipulated and agreed by the parties to that certain agreement of date of December 18, 1923, covering the payment to the beneficiaries under the will of Lucy A. H. Deady, that beginning November 1st, 1924, there shall be paid to Henderson Brooke Deady the sum of Four Hundred Dollars (\$400.00) per month instead of Three Hundred Dollars (\$300.00) per month as heretofore; without prejudice to the rights of the said parties or any of them in said controversy or to said estate or any part thereof, and without prejudice to the contentions made, or to be made, by any of the parties as to the title of the said Lot One (1) in Block Two Hundred Twelve (212) City of Portland, Oregon, and without prejudice to the rights of the Executors of the estate in the premises.

Dated at Portland, Oregon this day of October, 1924.

HANOVER DEADY

MATTHEW E. DEADY

MARY E. DEADY

JOSEPH SIMON

HENDERSON BROOKE DEADY

Executors

[Endorsed]: Filed Feb. 3 1925 Jos. W. Beveridge,
Clerk O. C. Thornton, Deputy

(Testimony of Hanover Deady.)

I hereby agree and enter into the above stipulation with the provision that said additional sum of One Hundred Dollars (\$100) per month shall be made to Henderson Brooke Deady by the executors, each month. The said One Hundred Dollars (\$100) to be paid by drawing a check in his behalf for Ninety Dollars (\$90) and in my behalf for the sum of Ten Dollars (\$10).

MARY T. DEADY

Henderson Brooke Deady

I agree to the above.

HENDERSON BROOKE DEADY

State of Oregon,

County of Multnomah—ss.

I, A. A. Bailey, County Clerk, Ex-Officio Recorder of Conveyances and Ex-Officio Clerk of the Circuit Court of the State of Oregon, for the County of Multnomah, which Court has exclusive jurisdiction of all probate proceedings in said County, do hereby certify that the foregoing copy of Stipulation in the Matter of the Estate of Lucy A. H. Deady, Deceased, Est. No. 22735 has been compared by me with the original, and that it is a correct transcript therefrom, and of the whole of such original Stip-

(Testimony of Hanover Deady.)

ulation as the same appears on file in my office and in my custody.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, this 15th day of May, A. D. 1940.

(Seal) A. A. BAILEY,
County Clerk.

By E. L. FERGUSON,
Deputy.

[Endorsed]: Filed Feb. 21, 1942.

Mr. Jaureguy: Q. Now, the second paragraph of the Pre-Trial Exhibit I, which is dated the 18th day of December, 1923, reads as follows:

“Whereas a controversy exists as to whether or not the estate of said deceased shall be distributed as by said will directed and as to the ownership of the real estate known as Lot One (1) in Block Two Hundred and Twelve (212) in the City of Portland, and included within the terms of said will;”

What was the controversy with respect to that real property that was referred to there? [162]

Mr. Maguire: We object to that as being wholly incompetent and might add terms to an agreement, and the agreement speaks for itself and cannot be varied by hearsay testimony or cannot be altered or added to.

(Testimony of Hanover Deady.)

Mr. Jaureguy: It isn't being altered. This controversy is referred to as a controversy, and I want to have him explain what that controversy was. There is a recital here that there was a controversy.

Mr. Maguire: Only hearsay.

The Court: He may answer. The testimony will be received, subject to the objection.

A. The controversy was as to whether Henderson should have any money at the present time and let all these other payments that were due under the will to be deferred until he got some money.

Mr. Jaureguy: Q. Well, that is the first part, where it says the controversy is as to whether the estate should be distributed. It also says "and as to the ownership of the real estate." Was there any controversy at that time as to the ownership of the real estate?

A. Not to my knowledge.

Q. Had Marye Thompson Deady made any claim?

A. Oh, yes, I beg your pardon, she had.

Mr. Maguire: I want to object to that as purely leading. The question was as to whether there was any controversy. [163]

A. Oh, yes, there was a controversy.

Mr. Maguire: I don't want to let counsel testify. Let the witness be bound by what is brought out.

The Court: I think there is something to that, Mr. Jaureguy. However, the witness has answered

(Testimony of Hanover Deady.)

and I will leave it in the record, but I think that this witness is wholly capable of testifying without having his attention directed to what counsel say. I am not impugning counsel's motives or counsel's ethics in the matter, but I think that this should be tried out on the memory of the witness.

Mr. Jaureguy: Q. Had any person named in the will of Lucy A. H. Deady made any claim with respect to this real property upon or about the time of the death of your grandmother?

A. Yes.

Q. And who was that?

A. Marye Thompson Deady, Uncle Paul's widow.

Q. When did you first hear of that claim?

Mr. Maguire: May we have an objection to any matter of the claim of Marye Thompson Deady or any conversations in regard to it, on the ground that they are wholly irrelevant and immaterial and not competent to prove any issue in this case.

The Court: The testimony is received, subject to the objection. Go ahead.

Mr. Jaureguy: Q. When did you first hear of that claim?

A. Well, shortly after Grandmother died. Marye Thompson Deady [164] came up here from California and made a claim against the estate for what she thought or understood was probably Paul's share of the estate.

Q. And whom did she talk to? You say she came

(Testimony of Hanover Deady.)

up and talked. A. Talked to Joseph Simon.

Q. And whom else, if anybody, that you know of?

A. To Uncle Henderson. Talked to my mother.

Mr. Maguire: Now you are certainly departing from our rules of evidence. Conversations alleged to be had by Marye Thompson Deady with Mr. Simon, Senator Simon, or with this witness' mother certainly aren't competent, and this is purely hearsay as to this witness and as to all parties in this case.

The Court: I think that you are correct, and I will sustain the objection and strike that testimony out, unless the witness testifies that he knew something about it.

Mr. Freed: He had just asked him, your Honor, whether they had a conversation. That was the only question, and I assume that it could not be hearsay. If it was it would be inadmissible.

The Court: Yes, I think it is fairly obvious that there may be some hearsay involved in the answer. That is why I am striking it.

Mr. Jaureguay: Q. Now, did you and Henderson have any conversations with respect to that claim? A. Yes. [165]

Q. And you say that he talked to your mother about it?

Mr. Maguire: There has as yet been no such testimony, that Henderson talked to the mother about it.

(Testimony of Hanover Deady.)

Mr. Jaureguy: He did, too; he just said that a couple of minutes ago.

The Court: Yes, and I struck it from the record.

Mr. Jaureguy: Beg your pardon?

The Court: And I struck it from the record.

Mr. Jaureguy: Oh, you struck it from the record?

The Court: Yes, I struck it from the record, because, I said, it was very obvious, unless he testified to something more, that there was hearsay involved in that answer.

Mr. Jaureguy: Oh, I beg your Honor's pardon. I get the point now.

Q. Were you ever present when there was any conversation between your Uncle Henderson and your stepmother with respect to this claim of Marye Thompson Deady? A. Yes, I was there.

Q. And where did that conversation take place?

A. At our old home out on the Peninsula, out on Curtis Avenue.

Q. Now to go back a moment, that was your stepmother? A. Yes, that was my stepmother.

Q. And your mother died when?

A. Shortly after I was born.

Q. And you have no recollection of her? [166]

A. No.

Q. And your father remarried, to your stepmother, when? A. I don't remember.

Q. Do you have any recollection?

(Testimony of Hanover Deady.)

A. No, I don't remember. I didn't know she was my stepmother until I was eighteen, I know that.

Q. In other words, it was when you were very young? A. Yes.

Q. Now, what was this conversation that you say took place between Henderson and your mother regarding this claim?

Mr. Maguire: Upon the same grounds and for the same reasons which we have heretofore urged to your Honor, we object to the testimony of conversations between Henderson Brooke Deady and Mary E. Deady, the stepmother of this witness, even though the witness were present.

The Court: Received, subject to the objection.

A. Henderson came out to the house to see mother, explaining to her that Marye was making claims against the estate and wanted Mother to do what she could, or, I might say, take sides, explaining to her at the time that if Marye should prevail in her contention that we would be only subject to getting a third of the estate.

Mr. Jaureguy: Q. And did he explain why that was?

A. Yes, he explained that if she won her contention, why, the same state of facts would leave us in the same position. [167]

Q. And what did he say would be the share you would get if you defeated Marye Thompson Deady?

(Testimony of Hanover Deady.)

A. Well, that was it, that we would only have a third of the estate.

Q. No, I say, if you defeated Marye Thompson Deady?

A. Oh, then we would have—we would take under Grandmother's will, as we always understood it to be, that Matthew and I should have the property if Henderson died without issue.

Q. Did he say that to your mother?

A. Oh, yes, very emphatic about it.

The Court: I want to suggest again, Mr. Jaureguy, that I want this witness to tell his memory of the conversation, without suggestion from counsel. He knows what the conversation was.

Mr. Jaureguy: What is that?

The Court: I say, he knows what the conversation was, and I want him to relate his memory of the conversation, have him give the complete conversation, and let it go at that.

Mr. Jaureguy: Q. Now, subsequent to that time did Marye Thompson Deady file her complaint—or, I will show you here Defendants' Pre-Trial Exhibit D, which is an amended complaint, and ask you if the original of that document or a copy of that document came to your attention about the time it was filed?

A. Well, I am going to answer that this way, that I don't remember exactly whether this suit had been filed when Henderson [168] was out there,

(Testimony of Hanover Deady.)

but it was shortly close to it. I know there had been a claim made by Marye against the estate. My best recollection is that a suit had been filed.

Mr. Jaureguy: We offer that Pre-Trial Exhibit D in evidence.

Mr. Maguire: To the receipt of this exhibit the plaintiff objects on the ground and for the reason that it is wholly incompetent to prove or disprove any issue of this case, to prove or disprove the intent of the testator, or to affect any right, title or interest of the estate of Henderson Brooke Deady in the property, or that of the plaintiff, or to diminish or change the nature of Henderson Brooke Deady's estate under his will.

The Court: Received, subject to the objection and subsequent ruling of the Court.

(Certified photostatic copy of Amended Complaint, Marye T. Deady v. Henderson Brooke Deady, et al, so offered, having previously been marked as Defendants' Pre-Trial Exhibit D, was thereupon marked received, subject to objection, ruling reserved.)

(Testimony of Hanover Deady.)

DEFENDANT'S PRE-TRIAL EXHIBIT D

In the Circuit Court of the State of Oregon for the
County of Multnomah.

MARYE T. DEADY,

Plaintiff,

vs.

HENDERSON BROOKE DEADY, MARY E.
DEADY, MATHEW DEADY, HANOVER
DEADY, and HENDERSON BROOKE
DEADY and JOSEPH SIMON as executors
of the estate of LUCY A. H. DEADY, de-
ceased,

Defendants.

AMENDED COMPLAINT

Plaintiff for cause of suit against the defendants,
complains and alleges in this her amended com-
plaint:

I.

That on or about the 24th day of March, 1893,
Mathew P. Deady was the owner and in possession
of certain real property, more particularly de-
scribed as Lot One (1), Block Two Hundred and
Twelve (212), Portland, appraised at Thirty Thou-
sand (\$30,000.00) Dollars; Lots Sixteen (16) and
Seventeen (17), Block Eight (8), Goldsmith's addi-
tion to the City of Portland, appraised at Five
Thousand (\$5,000.00) Dollars; also Block Three

(Testimony of Hanover Deady.)

(3), Hawthorne Place, East Portland, all situate in the City of Portland, Multnomah County, State of Oregon.

II.

That the said Mathew P. Deady died testate in Multnomah County, Oregon, on the 24th day of March, 1893, having prior to his death duly made, executed and published his last will and testament, hereinafter referred to, and that the only heirs at law of the said decedent were his wife, Lucy A. H. Deady, and the three sons of the said Mathew P. Deady and Lucy A. H. Deady, namely: Henderson Brooke Deady, Edward N. Deady and Paul R. Deady, all of whom were over the age of twenty-one years at the date of the death of their father, Mathew P. Deady, and that his said wife and sons were the only legatees, devisees and beneficiaries under the last will and testament of said deceased.

III.

That under and by the terms of said last will and testament of said Mathew P. Deady, his property, both real and personal, was bequeathed and devised in the following manner, to-wit: all personal property of which the testator died seized or possessed and the right to the use and enjoyment of the rents and profits of any and all real property for the term of her natural life were bequeathed to the testator's wife, Lucy A. H. Deady; and to each of his three sons above named was de-

(Testimony of Hanover Deady.)

vised, in fee simple, an undivided one-third of any and all real property of which the said testator, Mathew P. Deady, died seized or possessed, subject only to said life estate of his said wife, Lucy A. H. Deady.

IV.

That the said last will and testament of the said Mathew P. Deady, deceased, was duly and regularly probated in the County Court of Multnomah County, Oregon, and that on or about the 3rd day of January, 1894, the executors of the estate of the said deceased filed their final account and report and were duly and regularly discharged by the order of the Court of said County, and that it was by said court ordered, adjudged and decreed that the said Lucy A. H. Deady was entitled to the possession of all the personal property of which the said Mathew P. Deady was possessed at the time of his death, and in addition thereto to the right to the use and rents, for her natural life, of any and all real property of which the said testator died seized and possessed; and it was further by said court decreed that the said three sons of the said deceased were the owners of and each was entitled to an undivided one-third interest in and to all of the real property of which the said Mathew P. Deady died seized or possessed, subject only to the aforesaid life estate, and that by virtue of said bequest and devise said Lucy A. H. Deady went into pos-

(Testimony of Hanover Deady.)

session of the real property of said decedent, and at all times since the death of said deceased had and enjoyed the rents, issues and profits thereof.

V.

That the plaintiff herein was lawfully married to said Paul R. Deady on February 2, 1892, and that at all the times herein mentioned, prior to his death, plaintiff was the wife of said Paul R. Deady and is now his widow, the said Paul R. Deady having died intestate in Multnomah County, Oregon, on the 28th day of March, 1920; that there was no issue of said marriage between plaintiff and the said Paul R. Deady, and plaintiff is the sole heir at law of her said husband.

VI.

That on or about the 1st day of January, 1894, the said Lucy A. H. Deady appointed one Thomas Scott Brooke as her agent, and said Thomas Scott Brooke, sometimes called T. S. Brooke, was from said date at all of the times herein mentioned, the duly appointed and authorized agent of the said Lucy A. H. Deady, and in his capacity as such was authorized to and did transact business for and on behalf of said Lucy A. H. Deady, and particularly matters concerning said real property, until his death in the year 1915.

(Testimony of Hanover Deady.)

VII.

That the said Lucy A. H. Deady was, in the year 1893, about fifty-eight years of age, and that after the death of her said husband, the said Lucy A. H. Deady had very little income or means of support and was dependent upon the rents from the real property hereinbefore referred to, which were very meager and inadequate; and that because of the advanced age of the said Lucy A. H. Deady and her lack of sources of income other than the rent received from said Lot 1, Block 212, the said Lucy A. H. Deady and her said agent were desirous of increasing the income derived from the said Lot, and with this end and purpose in view, the said Lucy A. H. Deady and her agent, T. S. Brooke, proposed to increase the rents derived from the said property by constructing a large building on the said Lot, but that inasmuch as the said Lucy A. H. Deady did not have any or sufficient funds with which to construct the building contemplated, and neither she nor her said agent were able to procure funds or credit from any source for such purpose, it was conceived and proposed that in order to secure funds necessary to construct the said building, that the said lot be offered as security and a mortgage given thereon to the person, firm or corporation advancing the funds with which to construct the building contemplated.

(Testimony of Hanover Deady.)

VIII.

That the proposed construction of a building on the said property, and the ways, means and methods of obtaining money for financing the erection of such building were discussed by the parties interested for a considerable period, and that during the years 1894, 1895 and 1896 there were many family conferences held regarding the proposed scheme, and that during said period the said T. S. Brooke, acting as agent for the said Lucy A. H. Deady, attempted to procure loans from various sources, offering as security a mortgage upon said Lot, to be executed by the said Lucy A. H. Deady, but was unsuccessful for the reason that the said Lucy A. H. Deady was entitled only to the use and possession of said Lot for the term of her natural life, and was not the owner of the property, and further because of the fact that the said Henderson Brooke Deady, Edward N. Deady and Paul R. Deady, who were the actual owners of said Lot, were irresponsible financially and were incapable of caring for themselves and their interests in the said property and were known to be rapidly dissipating their assets, and that the said Paul R. Deady had, during the year 1894, placed a mortgage for the sum of two thousand dollars upon his undivided one-third interest in the said Lot, and the said Edward N. Deady had placed a mortgage for two thousand five hundred dollars upon his un-

(Testimony of Hanover Deady.)

divided one-third interest in the said Lot, and the said Lucy A. H. Deady and the said T. S. Brooke, her agent, were unable to find anyone able and willing to lend money secured by a mortgage upon the said premises, unless the mortgagee could be assured that the security would not be rendered valueless or uncertain by the acts of the said Henderson Brooke Deady, Edward N. Deady and Paul R. Deady; and that in order to procure a loan on the said premises for the purpose of constructing said building, and in order to give security satisfactory to a mortgagee, it was proposed and urged by the said Lucy A. H. Deady and the said T. S. Brooke, acting as her agent, that Henderson Brooke Deady, Edward N. Deady and wife and Paul R. Deady and this plaintiff execute and deliver to the said Lucy A. H. Deady, deeds conveying to the said Lucy A. H. Deady the legal title to said Lot for the sole and only purpose of enabling the said Lucy A. H. Deady and the said T. S. Brooke, her agent, to mortgage the said premises, and by so doing to secure funds to construct said building upon said Lot.

IX.

That the plaintiff herein and said Paul R. Deady refused and declined to execute a conveyance of any nature whatsoever which might divest the plaintiff or her husband of their interest in the said Lot, for the reason that it was the intention and

(Testimony of Hanover Deady.)

request of said Lucy A. H. Deady and her said agent, that no consideration be paid to the said Paul R. Deady or this plaintiff therefor, but that said conveyance of their undivided one-third interest in the said premises by the said Paul R. Deady and plaintiff be made and delivered without consideration, said conveyance to be for the sole purpose of placing legal title to the said Lot in the name of Lucy A. H. Deady, so as to enable her to offer a mortgage on said Lot to be executed and delivered as security; that the said Lucy A. H. Deady and her said agent, after repeated statements and representations to plaintiff and said Paul R. Deady that to increase the income and value of said Lot it would be necessary to construct a building thereon and that in order so to do it would be necessary to offer the same as security for a loan thereon, and after the said Lucy A. H. Deady and her said agent had persuaded the said Paul R. Deady that the only purpose and effect of the proposed deed from himself and his wife, the plaintiff herein, would be to place the legal title to said Lot in the said Lucy A. H. Deady during the life of said Lucy A. H. Deady, and that the equitable title should remain in and that the legal title would revert to him at the termination of said life estate of said Lucy A. H. Deady, the said Paul R. Deady insisted and demanded that the plaintiff sign such conveyance, at all times re-assuring plaintiff that

(Testimony of Hanover Deady.)

the said one-third interest of said Paul R. Deady and the plaintiff would be fully protected and that the legal, as well as the equitable title would be vested in them at the death of said Lucy A. H. Deady.

X.

That the plaintiff and said Paul R. Deady had, at all times, implicit faith and confidence in the said Lucy A. H. Deady and the said T. S. Brooke, her agent, and plaintiff and the said Paul R. Deady by reason thereof and relying upon the representations and assurances of the said Lucy A. H. Deady and said T. S. Brooke that the proposed transfer was but a nominal one and that plaintiff's and her said husband's interests and property rights would not only be fully protected, but would also be enhanced in value by the construction of said building, and that the legal title to said Lot would return to them upon the death of the said Lucy A. H. Deady as fully and completely as though the said conveyance to the said Lucy A. H. Deady had not been executed, and plaintiff and said Paul Deady believing such to be the only purpose and effect of said conveyance, this plaintiff and her said husband were induced to and did sign a certain deed dated January 20th, 1897, recorded in Book 236, page 362, Deed Records of the County of Multnomah, State of Oregon, whereby legal title to the said property was placed in the name of Lucy A. H. Deady.

(Testimony of Hanover Deady.)

XI.

That the said deed was signed and delivered by the plaintiff and her husband, the said Paul R. Deady, wholly without consideration and with the intent that the equitable title to the property should not be transferred, and said deed was accepted by the said Lucy A. H. Deady with that understanding and on that condition, and that the said Lucy A. H. Deady received the said conveyance as trustee for the plaintiff and her said husband, and covenanted and agreed with the plaintiff and her husband that the said property was to be held in her name as legal owner for the sole purpose of giving security for the proposed loan and mortgage, and that the legal title to the said property would be returned to the plaintiff and her husband upon the death of the said Lucy A. H. Deady.

XII.

That immediately after the execution of the deed aforesaid, the said Lucy A. H. Deady secured a loan of the sum of Eleven Thousand Dollars (\$11,000.00) from the Oregon Mortgage Company, giving as security to the said Oregon Mortgage Company, mortgagee, a mortgage upon the said Lot 1, Block 212, which mortgage was recorded on January 20, 1897, in Book 174 on page 292 thereof, Mortgage Records of Multnomah County, Oregon, and that immediately thereafter, pur-

(Testimony of Hanover Deady.)

suant to the terms of her trust, the said Lucy A. H. Deady and the said T. S. Brooke, her agent, commenced the construction of a large building upon the said premises.

XIII.

That at the time of the making and delivery of the deed aforesaid and for some time prior thereto, the plaintiff herein and her husband, the said Paul R. Deady, were in straitened circumstances financially and had difficulty in obtaining a livelihood, and that subsequent thereto their financial condition became such as to necessitate plaintiff's relying upon her own relatives for support and maintenance, so that at the death of the said Paul R. Deady, the plaintiff's husband, on March 28, 1920, plaintiff and her said husband were, of necessity, living apart.

XIV.

That prior to March 28, 1920, the said Lucy A. H. Deady made and executed her will, but that after the death of the said Paul R. Deady, the said Lucy A. H. Deady, pretending to believe that the plaintiff and the said Paul R. Deady were no longer husband and wife, made and signed an instrument on July 29, 1920, which she declared to be her last will and testament.

XV.

That the said Lucy A. H. Deady died in Multnomah County, Oregon, on the 29th day of August,

(Testimony of Hanover Deady.)

1923, and that the said Will, dated July 29th, 1920, was admitted to probate on the 5th day of September, 1923, in the Circuit Court of Multnomah County, Oregon.

XVI.

That, by the terms of the said Will, the said Lucy A. H. Deady attempted to appropriate and devise the said Lot 1, Block 212, as though both the legal and equitable title to said property were vested in the said Lucy A. H. Deady, and utterly disregarding and ignoring the rights of said Paul R. Deady and the plaintiff as the widow and sole heir at law of the said Paul R. Deady, deceased, to an undivided one-third interest in fee simple, in the said Lot, and in violation of her trust and for the purpose and with the intent of defrauding and depriving plaintiff of the interest in said property to which she was and is justly and equitably entitled by reason of her being the sole heir at law of said Paul R. Deady, wrongfully and surreptitiously attempted to devise plaintiff's said one-third interest in said Lot to persons other than plaintiff, to plaintiff's great loss and damage.

XVII.

That said undivided one-third of said Lot is now of the value of more than One Hundred Thousand (\$100,000.00) Dollars.

(Testimony of Hanover Deady.)

XVIII.

That it is inequitable and unjust to permit the said Lucy A. H. Deady and her executors and personal representatives to repudiate her said trust and to ignore plaintiff's interest in the said Lot, or to allow said property to be considered the property of Lucy A. H. Deady, or to be devised by her, under the terms of her last will and testament, to the exclusion of plaintiff from plaintiff's right, title and interest therein.

XVIX.

That defendants, Henderson Brooke Deady and Joseph Simon are the duly qualified and acting executors of the estate of Lucy A. H. Deady, deceased, and as such are in possession and control of the said property, and said executors have had and received the rents, issues and profits thereof since the death of the said Lucy A. H. Deady, and that defendants, Henderson Brooke Deady, Mary E. Deady, Mathew Deady, and Hanover Deady claim interests in said property adverse to the claim of this plaintiff.

XX.

That the plaintiff has no plain, speedy or adequate remedy at law.

Wherefore, plaintiff prays for judgment and decree herein, as follows:

(Testimony of Hanover Deady.)

1. That It Be Decreed that the legal title to the undivided one third interest in Lot One (1) of Block two hundred and twelve (212) of the City of Portland, Multnomah County, Oregon, devised by the said Matthew P. Deady to the said Paul R. Deady, was conveyed by the said Paul R. Deady and plaintiff herein, to said Lucy A. H. Deady in trust only, and that the equitable title therein remained in the grantors in said deed;

2. That It Be Decreed that plaintiff, as the only heir at law of the said Paul R. Deady, is the owner in fee simple, of said undivided one third interest in said lot;

3. That the said Executors of the Estate of said Lucy A. H. Deady, deceased, be required to execute and deliver to plaintiff, a good and sufficient deed of conveyance, conveying to her the title in fee, to the said undivided one third interest in and to said lot; and in default thereof, that it be decreed that this decree of the court shall stand for and in place of such deed and that the same shall constitute a conveyance to plaintiff, of said undivided one third interest in said lot.

4. That defendants account to this plaintiff for all revenues received by them, or either of them, from the said undivided one third interest in said lot, since the death of the said Lucy A. H. Deady; and that plaintiff have judgment against said defendants for the amount so received by them;

(Testimony of Hanover Deady.)

5. That defendants and all persons claiming any interest through them, in said undivided one third interest in said lot, be forever barred of any estate, right, title or interest therein;

6. That plaintiff have and recover her costs and disbursements incurred in this suit;

7. That plaintiff have such other and further relief herein, as to the court may seem just and equitable.

GRIFFITH, PECK & COKE

JOHN S. COKE,

Attorneys for Plaintiff.

State of Oregon,

County of Multnomah—ss.

I, Marye T. Deady being first duly sworn, depose and say that I am the Plaintiff in the above entitled Cause; and that the foregoing Amended Complaint is true, as I verily believe.

MARYE T. DEADY.

Subscribed and sworn to before me this 8th day of July, 1925.

(Seal) A. G. BARRY,

Notary Public for the State of Oregon.

My commission expires 6/24/27.

(Testimony of Hanover Deady.)

State of Oregon,

County of Multnomah—ss.

I, John S. Coke, one of attorneys for Plaintiff in the within entitled Cause, do hereby certify that the foregoing Amended Complaint is in my opinion well founded in law.

State of Oregon,

County of Multnomah—ss:

Due, timely and legal service by copy admitted at Portland, Oregon, this 8th day of July, 1925.

SIMON, GEARIN,

HUMPHREYS & FREED,

Attorneys for Defendants.

State of Oregon,

County of Multnomah—ss.

I, A. A. Bailey, County Clerk and Ex-Officio Clerk of the Circuit Court of the State of Oregon for the County of Multnomah, a Court of Record, do hereby certify that the foregoing copy of Amended Complaint (Marye T. Deady, Plaintiff, vs. Henderson Brooke Deady, et al, Defendants) No. K-8897 has been compared by me with the original and that it is a correct transcript therefrom, and of the whole of such original Amended Complaint as the same appears on file in my office and in my custody.

In testimony whereof, I have hereunto set my

(Testimony of Hanover Deady.)

hand and affixed the seal of said court, this 6th day of May A. D. 1940.

A. A. BAILEY,

County Clerk.

(Seal) MARY DUNKIN,

Deputy.

[Endorsed]: Filed Feb. 21, 1942.

Mr. Jaureguy: Now I hand you Pre-Trial Exhibit E—or, I offer in evidence Pre-Trial Exhibit E.

Mr. Maguire: To the receipt of this exhibit the plaintiff offers the same objection, on the same grounds and reasons offered as to the previous exhibit. [169]

The Court: Received in the record, subject to the objection and subsequent ruling of the Court.

(Photostatic copy of compromise agreement between Marye Thompson Deady, Henderson Brooke Deady, et al, so offered and received, having previously been marked as Defendants' Pre-Trial Exhibit E, was thereupon marked received subject to objection, ruling reserved.)

DEFENDANTS' PRE-TRIAL EXHIBIT E

Whereas Marye T. Deady has filed suit in the Circuit Court of the State of Oregon for Multnomah County against Henderson Brooke Deady, Mary E. Deady, Matthew Deady, Hanover Deady and Henderson Brooke Deady and Joseph Simon as execu-

(Testimony of Hanover Deady.)

tors of the estate of Lucy A. H. Deady, deceased, being Case No. K 8897, for the relief claimed in said suit, among other things for an undivided one-third interest in Lot one, Block two hundred twelve, in the City of Portland, County of Multnomah, State of Oregon, and

Whereas the undersigned, being all the beneficiaries and legatees under the will of Lucy A. H. Deady of said property, and being all the persons interested in said property and in the income therefrom, have compromised and settled the controversies created by said suit, whereby said suit is to be dismissed without costs and with prejudice. now therefore

In Consideration of the Premises, and of said settlement and the dismissal of said suit, and of the execution of this agreement, it is agreed by the undersigned that from the income derived from said Lot 1, Block 212, there shall be paid to Marye T. Deady (she being the same person named as Marye Thompson Deady in the will of Lucy A. H. Deady) during the term of her natural life and beginning November 1, 1925, the sum of One hundred fifty Dollars (\$150.) per month, payable monthly. Such monthly payment shall supersede and be in lieu of the monthly payment of \$75. provided for said Marye T. Deady in said will of Lucy A. H. Deady. All other payments of income provided for in said will shall remain as specified in said will, except that Henderson Brooke Deady shall continue to be

(Testimony of Hanover Deady.)

paid four hundred Dollars per month, or such other sum per month during the administration of the estate of said Lucy A. H. Deady in the discretion of the executors as they may deem proper and until he shall become entitled to the full distribution provided for in said will, and the stipulation and agreement made by the parties October 1924, is hereby rescinded and cancelled; but the payments of \$150 per month each to Marye T. Deady and to Mary E. Deady shall have priority over other payments of said income.

And the undersigned hereby expressly authorize and direct said executors and the trustees and managers of said property and their successor or successors, whether named in said will or otherwise appointed, to make the monthly payment of income to Marye T. Deady hereinbefore agreed to without other or further authority, direction or order from any person or any court; and the undersigned hereby authorize and direct the said executors and the trustees and managers of said property and their successor or successors, whether named in said will or otherwise appointed, to defer the creation of a sinking fund under paragraph Fifth of the will of Lucy A. H. Deady, deceased, until after the death of either Marye T. Deady, Mary E. Deady *of* Henderson Brooke Deady, and upon the death of any one of said three persons named, the sinking fund provision of said will shall be effective; and the undersigned for themselves, their heirs, administrators,

(Testimony of Hanover Deady.)

successors and assigns and for all persons claiming by, through or under them, or any of them, hereby expressly waive and release all claims of any and every nature whatsoever which they or any of them might have or assert against any executor, trustee or trustees, manager or managers, their heirs, administrators, successors or assigns, by reason of such monthly payments of income to Marye T. Deady, or by reason of deferring the creation of such sinking fund, or by reason of any thing resulting from or attributable to such monthly payments of income to Marye T. Deady, or the deferring of such sinking fund.

It is agreed that said Marye T. Deady shall make, execute and deliver to Henderson Brooke Deady, Matthew Deady, and Hanover Deady, in proportion to their interests in said Lot 1, Block 212, City of Portland, Oregon, under said will of Lucy A. H. Deady, deceased, a special warranty deed to said lot 1, Block 212, City of Portland, Oregon, and said deed shall be subject to the terms of this agreement, and to the payment of said \$150. per month to said Marye T. Deady during the remainder of her life. And said lot shall be impressed with and be held in trust and remain in the possession of the trustees and the income from said property shall be collected and distributed by the trustees and said property shall be and remain charged with the payment of said \$150. per month to said Marye T. Deady during the remainder of her natural life.

In Witness Whereof, the parties have hereunto

(Testimony of Hanover Deady.)

set their hands and seals this 28th day of October,
1925.

Witnessed.

L. W. Humphreys

Chester V. Dolph as to

Henderson Brooke Deady (Seal)

Matthew Edward Deady (Seal)

Hanover Deady (Seal)

John S. Coke

Mae Connors

As to signature of Marye T. Deady

Marye T. Deady (Seal)

Mary E. Deady (Seal)

Accepted.

HENDERSON BROOKE DEADY

JOSEPH SIMON

Executors.

State of Oregon

County of Multnomah—ss.

This certifies that on this 28th day of October,
1925, before me, the undersigned, a Notary Public
in and for said County and State, personally ap-
peared the within named Mary E. Deady, who is
known to me to be the identical person described
in and who executed the foregoing instrument and
acknowledged to me that she executed the same
freely and voluntarily for the uses and purposes
therein mentioned.

(Testimony of Hanover Deady.)

In Testimony Whereof, I have hereunto set my hand and Notarial Seal this the day and year first herein written.

(Seal) ANNA GMAHLING

Notary Public for Oregon. My Commission expires: Nov. 16, 1927.

State of Oregon

County of Multnomah—ss.

This certifies that on this 28th day of October, 1925, before me, the undersigned, a Notary Public in and for said County and State, personally appeared the within named Marye T. Deady, who is known to me *to me* to be the identical person described in and who executed the foregoing instrument, and acknowledged to me that she executed the same freely and voluntarily for the uses and purposes therein mentioned.

Notary Public for Oregon. My Commission expires:

State of Oregon

County of Multnomah—ss.

This certifies that on this 28th day of October, 1925, before me, the undersigned, a Notary Public in and for said County and State, personally appeared the within named Henderson Brooke Deady, Matthew Deady and Hanover Deady, who are known to me to be the identical persons described in and

(Testimony of Hanover Deady.)

who executed the foregoing instrument and severally acknowledged to me that they executed the same freely and voluntarily for the uses and purposes therein mentioned.

In Testimony Whereof, I have hereunto set my hand and Notarial Seal this the day and year first herein written.

(Seal) L. W. HUMPHREYS

Notary Public for Oregon. My Commission expires:
Jan. 11, 1929.

[Endorsed]: Filed Feb. 21, 1942.

Mr. Jaurequy: Q. I wish the witness would take that exhibit that has just been introduced in evidence. That exhibit is dated October 28, 1925. Was Henderson in town at that time?

A. Yes, he was in town at the time.

Q. You said some time ago that he had been in town a year or a year and a half after the death of your grandmother. This, I notice, is dated two years and two months after the death. Had he been in town continuously, or in and out?

A. Yes, he had been in town continuously. I don't remember exactly the time.

Q. Now, between the time of the stipulation which is Exhibit J, dated October, 1924, and the time when you signed the exhibit which you have in your hand, were there any conversations between

(Testimony of Hanover Deady.)

you and Henderson with respect to the income from the property?

A. Not except in relation to this particular stipulation or settlement here. [170]

Mr. Maguire: I didn't get the answer.

A. I say, not except in relation to this particular settlement or agreement or stipulation, or whatever you call it.

Mr. Jaureguy: Q. All right, just state what those conversations were.

Mr. Maguire: And may it be understood that as to these conversations of Henderson Brooke Deady we offer the same objections as we did to the previous conversations?

The Court: Yes.

A. Well, it was the same conversation. I will say it this way, that this happened in Joseph Simon's office, that he wanted an opportunity to receive more money and for the same reason, that he was a sick man and needed all the money he could get, that he would never have any children, that Matthew and I were coming into the property anyhow, and it was only fair that he should receive as much money as he could as soon as he could.

Mr. Jaureguy: Q. Now, those statements that he made to you, did you in any way rely on them?

Mr. Maguire: Objected to upon the ground that it is not proper to call for, under the circumstances, in regard to the statements of Henderson Brooke

(Testimony of Hanover Deady.)

Deady, it having been established, as well as in the knowledge of this witness, the relater, and Henderson Brooke Deady, and it already appears that he was advised by counsel of his rights in the matter.

The Court: Received in the same manner. [171]

A. Why, certainly I relied on them, but I also knew he was telling the truth as far as the property conditions were concerned.

Mr. Jaureguy: Q. Well, in what way did you rely on them?

A. Well, I relied on them that he was not going to have any—I mean that he didn't have any children, but that brought up the subject as to whether or not he did have a child at that time. I remember I——

Q. (Interrupting) Well, that is not what I am asking you. I am asking you whether you relied on them. Would you have signed those three stipulations if he had told you that he claimed two-thirds of the property outright?

A. No, sir, I would not.

Q. And why not?

A. Well, it would take away from the property all the sinking funds and everything else that under the will should have been given to the property, and that if he was coming into the property himself some day, why, I wouldn't see any reason for doing him any particular favor at that particular time.

Q. Now, did you ever have occasion to question his assertions that he had no children?

(Testimony of Hanover Deady.)

A. Yes.

Q. Where was that?

A. That was a conversation I had with him in the Hazelwood at lunch time. [172]

Q. Just relate that conversation, as near as you can recall.

A. At that time he brought up the fact that we were going to make a settlement with Marye Thompson Deady, that he wanted in that particular stipulation a settlement for some more money, and brought out the fact that he, again, did not have any children, wasn't going to have any, and I brought up the fact to him that I understood that there was a young man in the East who was the child of the lady that he was enamored with back there and I had understood, or I had heard rumors, rather, that it was his boy. I said, "Where do we get off signing all these stipulations if that is so?" referring to Matthew and I, and he said he didn't have any children by anybody, it wasn't so. I asked him if he would give me an affidavit to that effect, and he said he would, and he did.

Q. Could you tell us how long after the conversation he gave you the affidavit you refer to?

A. I couldn't tell you how long after the conversation. It was within a day or so after we signed this. It was a very short time, I remember that.

Q. Well, I am not sure that I got the chronology.

A. I beg your pardon?

(Testimony of Hanover Deady.)

Q. You say a day or so after you signed that what happened?

A. A day or so after we signed this that I got the affidavit.

Q. Well, do you know with respect to either the affidavit or the exhibit—— [173]

A. (Interrupting) I was referring to all three of these stipulations we signed when I brought up that fact, that we had already signed some stipulations.

Q. Yes.

A. And here we were signing another one to give him some more money, and I didn't know, if that rumor was true, where we sat in the situation.

Q. Well, what I am getting at is, do you have any recollection with reference to the time you signed the exhibit, Exhibit E, that you had that conversation? That is the exhibit you have in your hand. Was it before, or after, the same day, or when?

A. Oh, no, it was before this was signed and after the other two stipulations, the first two stipulations, were signed.

Q. That is, that the conversation took place?

A. Yes.

Q. Well, could you give us any idea how long before?

A. Well, no. It was after we had won—after Marye had lost her suit, and we was entering into an agreement to make a settlement with her.

(Testimony of Hanover Deady.)

Q. You say after she had lost her suit?

A. Well, she did not prevail in her contentions that she had any property rights outside of what she was entitled to under the will.

Q. Do you know how that suit terminated?

A. Yes. [174]

A. It was terminated in favor of the Estate, the Lucy A. H. Deady Estate.

Q. What I meant, was it in the form of a trial, or stipulation, or what?

A. Yes, it was a trial, and we answered—that is, I say “we”—Joseph Simon answered in the form of a demurrer and we won the demurrer, and then later made a settlement with her.

Q. And that settlement is that Exhibit E?

A. That is right.

Q. Then I hand you Exhibit H, Pre-Trial Exhibit H, and ask you if that is the affidavit to which you are just referring, or, rather, whether that is a photostatic copy of it?

A. Yes, that is it.

Q. Now, you say that conversation where you say that affidavit resulted was had where?

A. We were having lunch together at the Hazelwood.

Q. You didn't get the affidavit at that time?

A. Oh, no.

Q. How long was it after that that you got the affidavit?

(Testimony of Hanover Deady.)

A. I don't know, I can't say definitely, but I know that it was a very short time, two or three or four days. I don't know exactly when it was.

Q. Do you know where you got the affidavit?

A. Well, my recollection was it was in Chester Dolph's office.

Q. And where was that? [175]

A. Well, that was in the Mohawk Building.

Q. What did you do with that affidavit?

A. I kept it.

Q. Have you had it ever since? A. Oh, yes.

Q. Do you still have it?

A. I have it with me now.

Q. Now, subsequent to that time did you have any discussions or arguments with him on any proposed agreement?

A. No. I had an argument or a talk with him on a proposed agreement just before he left for the East.

Q. And where did that talk take place?

A. That took place in Joseph Simon's office.

Q. Private office?

A. Yes, his private office.

Q. And who was present at that time?

A. Well, my brother was present at that time, and a little later on Lester Humphreys came in.

Q. When was that with respect to the signing of this affidavit, before or after.

A. This was after this affidavit.

(Testimony of Hanover Deady.)

Q. And, you say, shortly before he went East?

A. Yes, shortly before he went East.

Q. All right, I wish you would explain what took place on that occasion. [176]

A. Well, he explained to me that his divorce had been granted and this suit with Marye had been settled and that he was going back and marry this lady that he wanted to marry—Charlotte was her name, Charlotte Busck—that he was going to marry as soon as he could but he probably would have to wait the time limit, six months, or five months, whatever it was, before he could marry her, but in the meantime he was afraid that if anything happened to him he would not be able to give her any money, because he would not be entitled to give her any money, and he would be able to after he married her, under his mother's will be entitled to give his income to her. I—the fact of the matter is I got very indignant about it, refused to sign it or have anything to do with it.

Q. Well, did he have the document there, or just talking about an agreement?

A. Oh, no, he didn't have the document there. He spoke of having one made and drawn up for us to sign. He may have had one, but he didn't show it to me, I never saw it.

Q. Then what happened?

A. Well, at that time he asked me to sign this I refused just point blank, and he got very indig-

(Testimony of Hanover Deady.)

nant and mad about it and, in fact, the only way I could express it, he blew up,—it was the only real quarrel we ever had—and Lester Humphreys was across the hall of the main office, he came across and got hold of Henderson, started to quiet him, while I walked out—I [177] didn't wait to listen to anything further—walked out of the main office. That is the last time I saw him.

Q. Handing you Defendants' Pre-Trial Exhibit K, I wish you would look at that and state, if you can, the circumstances under which that was signed? Pardon me, before the witness does that, we offer Pre-Trial Exhibit H in evidence, being the affidavit.

Mr. Maguire: We object to the receipt of this exhibit, because it is irrelevant and immaterial to any issue in this case, and incompetent to prove any issue in this case, on the same grounds and same reasons which we have heretofore urged as to the last two exhibits.

The Court: Received in the record, subject to the objection and further ruling.

(Photostatic copy of affidavit of Henderson Brooke Deady, dated October 29, 1925, so offered and received, having previously been marked as Defendants' Pre-Trial Exhibit H, was thereupon received subject to the objection, ruling reserved.)

(Testimony of Hanover Deady.)

DEFENDANTS' PRE-TRIAL EXHIBIT H

In the Circuit Court of the State of Oregon
for Multnomah County.

In the Matter of the Estate of Lucy A. H. Deady,
Deceased.

State of Oregon
County of Multnomah—ss.

I, Henderson Brooke Deady, being first duly sworn, say on oath, that I am a son of Lucy A. H. Deady, deceased, and one of the heirs at law of her Estate. I further depose and say that no child or children have ever been born to me, and that I have not had and have not now any issue by marriage or otherwise.

HENDERSON BROOKE DEADY

Subscribed and sworn to before me this 29th day
of October, 1925.

(Seal)

CHESTER V. DOLPH

Notary Public for Oregon.

My Commission expires: July 21, 1928.

[Endorsed]: Filed Feb. 21, 1942.

A. This was a stipulation that was entered into in August, 1931, in which Henderson was to get a definite sum of money and in which for the first time there was to be made any sinking fund for the prop-

(Testimony of Hanover Deady.)

erty and in which at that time Matthew and I got fifty dollars more a month than was stipulated—than the will called for, for the ten-year period.

[178]

Q. Now, do you know where Henderson was when that was entered into?

A. No, I don't, but I know he wasn't here. I assume that he was either in New York or Switzerland.

Q. Did you have any conversations or communications with him with respect to that?

A. No, I did not have.

Q. And you got——

A. (Interrupting) I got my information from Joseph Simon.

Mr. Jaureguy: We offer Exhibit K in evidence.

Mr. Maguire: We object to this upon the ground that it is incompetent, on the same grounds and for the same reasons.

The Court: Same ruling.

(Certified photographic copy of stipulation, executed August, 1931, by Henderson B. Deady and Joseph Simon, executors, and Mary E. Deady, Matthew E. Deady, Hanover Deady, and Henderson B. Deady, so offered and received, having previously been marked as Defendants' Pre-Trial Exhibit K, was thereupon marked received subject to the objection, ruling reserved.)

(Testimony of Hanover Deady.)

DEFENDANTS' PRE-TRIAL EXHIBIT K

In the Circuit Court of the State of Oregon
for the County of Multnomah
Department of Probate

22735

In the Matter of the Estate of
LUCY A. H. DEADY, Deceased.

STIPULATION

Whereas, under date of December 18, 1923, a stipulation was entered into by Henderson Brooke Deady, Hanover Deady, Mary E. Deady, Matthew Edward Deady, and Marye Thompson Deady, with the acquiescence of Joseph Simon and Henderson Brooke Deady, Executors of the Estate of Decedent, whereby the said parties, without prejudice to their rights, fixed certain sums to be drawn monthly by each of them; and

Whereas, in October, 1924, a supplementary stipulation was entered into between the said parties, changing in one respect the monthly sum so allotted; and

Whereas, neither stipulation was made effective for any definite period but was and is subject to abrogation, prospectively, by any of the parties at any time; and

Whereas, the said stipulations were silent with regard to the residue of the income, and the Executors, after curtailing the principal mortgage indebted-

(Testimony of Hanover Deady.)

ness and paying interest thereon, and distributing the fixed sums awarded by the Stipulation to Matthew Edward Deady, Hanover Deady, Mary E. Deady and Marye Thompson Deady, have, until February, 1931, turned over the approximate balance of the income to Henderson Brooke Deady; and

Whereas, it is the desire of the parties to effect a definite allocation of estate income for the remainder of the 10-year period mentioned in the Will of Lucy A. H. Deady, beginning August 1, 1931, and continuing until the end of August, 1933;

Now, therefore, for and in consideration of the premises, the undersigned parties agree to and with each other as follows:

1. Each of the undersigned parties ratifies, confirms and approves the disposition which the Executors of the Estate of Lucy A. H. Deady have up to this time made of the income received by said Estate, and releases and discharges each of said Executors from and against any claim arising from the failure on the part of said Executors, and/or either of them, to follow the precise mandate of the Will of Decedent, or of either of said former stipulations.

2. The income of said Estate, during the period above mentioned, shall, from and after August 1, 1931, be distributed as follows:

- (a) Payment of interest on mortgage indebtedness.

(Testimony of Hanover Deady.)

(b) Setting aside of \$100.00 per month to be applied, as and when practicable, upon reduction of the principal of the mortgage indebtedness.

(c) \$150.00 per month to Mary E. Deady
150.00 per month to Marye Thompson Deady
150.00 per month to Matthew Edward Deady
150.00 per month to Hanover Deady
600.00 per month to Henderson Brooke Deady.

3. If the net income of said estate, for any cause, is diminished to such an extent that funds with which to effectuate same are not available to the Executors, the percentage basis of allocation contained in the foregoing paragraph shall be followed in the distribution of the diminished fund. If the death of Mary E. Deady or Marye Thompson Deady occurs prior to the expiration of the period herein fixed, the sum to be paid such decedent hereunder shall, during the remainder of said period, be added to the amount payable to Henderson Brooke Deady hereunder.

(Testimony of Hanover Deady.)

Witness the following signatures and seals this
day of August, 1931.

HENDERSON B. DEADY

JOSEPH SIMON

Executors

MARY E. DEADY

.....
MATTHEW E. DEADY

HANOVER DEADY

HENDERSON B. DEADY

[Endorsed]: Filed Oct 9 1931. A. A. Bailey,
Clerk, O. C. Thornton, Deputy.

State of Oregon,
County of Multnomah—ss.

I, A. A. Bailey, County Clerk, Ex-Officio Recorder
of Conveyances and Ex-Officio Clerk of the Circuit
Court of the State of Oregon, for the County of
Multnomah, which Court has exclusive jurisdiction
of all probate proceedings in said County, do hereby
certify that the foregoing copy of Stipulation in the
Matter of the Estate of Lucy A. H. Deady, De-
ceased, Est. No. 22735 has been compared by me
with the original, and that it is a correct transcript
therefrom, and of the whole of such original Stipu-
lation as the same appears on file in my office and in
my custody.

(Testimony of Hanover Deady.)

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, this 15th day of May, A. D. 1940.

(Seal) A. A. BAILEY,

County Clerk.

By E. L. FERGUSON,

Deputy.

[Endorsed]: Filed Feb. 21, 1942.

Mr. Jaureguy: Q. I want to hand you Pre-Trial Exhibit K and wish you would look at that and tell us what you know, if anything, of the circumstances leading up to the preparation of that exhibit? A. Shortly after—— [179]

Mr. Maguire: (Interrupting) as to this document which has been handed to the witness, we object to either testimony with regard to the same or the receipt of same or any part thereof in evidence, for the reason that to the knowledge of this witness and of the other defendants it was a document prepared upon a proposed offer of compromise and is wholly incompetent to be received in the case.

The Court: The direction is the same. [180]

Well, in any event, following my idea that all this testimony should go in the record here, I will receive it on the same terms.

Mr. Jaureguy: Q. Now, do you remember the question?

(Testimony of Hanover Deady.)

A. No, I would rather have it repeated, please.

Q. State what you know about the circumstances leading up to the preparation of that document.

A. Shortly after Uncle Henderson died I went down to see Joseph Simon. [187] In my conversation with him about the status of the estate——

The Court: (Interrupting) I think that is not proper, Mr. Jaureguy. [188]

Mr. Jaureguy: Q. Then thereafter what did you do?

A. Well, it is pretty hard to explain. I don't want to say anything I shouldn't, but shortly after Henderson died I took the will and read it over again, trying to digest it, and went to Ralph Wilbur and explained to him and asked him about what amount and for what period Charlotte Deady should receive a certain amount of money. My thought was that Henderson had died within the ten-year period and was getting a certain stipulated sum at that time, and I couldn't understand or didn't understand as to whether she was to continue to get the amount that he was getting or exactly what amount she was to get and for how long.

Q. And how long would you say after Henderson's death was it that you went up to Ralph Wilbur?

A. Well, it wasn't very long; within two or three weeks, maybe less than that.

(Testimony of Hanover Deady.)

Q. And then what happened as a result of your conversation with him?

A. My opinion at that time, as I told him, that I thought that inasmuch as Henderson——

Mr. Maguire: (Interrupting) I move that this be stricken. It is not responsive to the question.

Mr. Jaureguy: The opinion, or the—— [189]

Mr. Maguire: (Interrupting) Or his conversation with Mr. Wilbur.

The Court: Yes, the last part, the last answer is stricken.

Mr. Jaureguy: Q. What happened after your conversation with Mr. Wilbur?

A. Well, after the conversation, then Mr. Wilbur drew up a stipulation which——

Q. (Interrupting) Do you know where that stipulation is? A. No, I don't.

Q. Or any copy of it? A. No, I don't.

Q. All right, proceed.

A. (Continuing) —which purported to be that Charlotte Deady should receive the same amount of money——

Mr. Maguire: (Interrupting) Just a minute. Mr. Wilbur drew up the stipulation. I assume that there is in his files there a copy of the stipulation.

[190]

Mr. Jaureguy: Q. Now, without telling what was in that document, what happened to it? Did Mr. Wilbur keep it or did he send it off, or what?

A. Oh, no, he sent it East to be signed.

(Testimony of Hanover Deady.)

Q. And then what happened? Did it come back?

A. No, it didn't come back.

Q. And what did come back?

A. This stipulation here came back.

Q. And you are referring now to Pre-Trial Exhibit K?

A. That is correct.

Q. And what happened when that came back?

A. Well; I was notified by Mr. Wilbur that it had come in his office, and after going up and reading it I refused to sign it, because it was the same thing that the will covers.

Q. What do you mean by that?

A. Well, I don't know whether I can refer to the other stipulation or not, but I—

Q. (Interrupting) No, just refer to this one. What do you mean by that statement?

A. I didn't see any reason for signing it. It didn't give us anything further than what the will covers.

Q. No, you didn't get my question. You said that it didn't give you anything other than the will gave you. Just explain what you mean by that.

A. Well, it said the same thing that the will said.

Q. Well, explain why that is true, why that was true in your mind. [192]

A. Well, I knew what the will said. My grandmother had told me and Henderson had told me and I read it myself. I knew what the will said.

Q. What does this say that you say is the same thing as what the will says?

(Testimony of Hanover Deady.)

A. Oh, I see what you mean. Well, that Charlotte Deady should receive two-thirds of the income for her life, as given Henderson the right to give her at the time of his death, and it didn't give Matthew and I any more money out of it. It also was agreed that we owned the property, the same thing as the will said.

Q. Now—don't answer this, if counsel wants to object—Did you discuss that with Mr. Wilbur?

Mr. Maguire: Object to that as being irrelevant and immaterial, incompetent to prove any issue in this case.

The Court: Q. Now, up to that time had anybody ever asserted to you or claimed that after Henderson's death without children you and Matthew did not own the property or would not own the property? A. No, they did not.

Q. And when was the first time you ever heard any such claim?

A. I think the first real claim was when I got a letter from Bob Maguire.

Mr. Maguire: The first real claim?

A. Yes. I heard indications that they were going to bring a suit, but I hadn't heard that. [193]

Mr. Jaureguy: I wonder if we could have Plaintiff's Exhibit 3 and show it to the witness. I want to ask you if that is the letter you referred to just a moment ago?

A. That is the letter I referred to.

(Testimony of Hanover Deady.)

Q. Now, at the time that you spoke about when you went up to Ralph Wilbur's office and didn't sign that stipulation, did you in any way rely on the statements that you testified to that Henderson Brooke Deady made to you that on his death you and Matthew would own the property?

A. Yes, sir.

Mr. Maguire: Object to that as being wholly incompetent and irrelevant, patently, upon the testimony of this witness, not competent or relevant, and a conclusion, and wholly self-serving.

The Court: Received under the same condition.

A. Yes, I did.

Q. And in what way?

A. I don't know how to explain it any better than I have. Henderson had explained to me all the time that he would die without issue and we would come into the property.

Q. Now, if he or anybody else had ever told you that Henderson had a fee simple estate or that he had an estate that he could will or devise to others after his death would you have refrained from signing that or would you have signed it if anybody had made such a contention? [194]

Mr. Maguire: Objected to as wholly speculation, could not be competent or relevant to prove any issue in this case and not to mention as leading and suggestive.

Mr. Jaureguy: To show reliance on it. The only way to find out if a man relied is to ask him, and

(Testimony of Hanover Deady.)

we could put it hypothetically, if we can't otherwise, to explain what his position would have been.

The Court: He may answer under the same condition.

A. I certainly would have signed it.

Mr. Jaureguy: Now we wish to offer Pre-Trial Exhibit G in evidence.

Mr. Maguire: To the receipt of this exhibit the plaintiff objects, upon the ground that it is wholly irrelevant, incompetent and immaterial to prove any issue in this case, and the further grounds and reasons that we have heretofore suggested as to other documents of this kind, and, further, that it is incompetent to receive in evidence any document or any other matter in negotiation of a compromise settlement.

The Court: Received under the same conditions.

(Copy of unexecuted agreement between Charlotte Howell Deady, Hanover Deady, and others, dated October 22, 1934, so offered and received, having previously been marked as Defendants' Pre-Trial Exhibit G, was marked received subject to the objection, ruling reserved.)

[195]

Mr. Jaureguy: Q. Now, referring again to Exhibit G, I wish you would look at that document again and on the last page where what purport to be typewritten copies of signatures are. When you went up to Ralph Wilbur's office was there any signature on there other than those?

(Testimony of Hanover Deady.)

Mr. Maguire: May it please the Court, this is offered and received as being a copy of the instrument. Now, if you are going to impeach the instrument—

Mr. Jaureguy: Well, as Mr. Freed explained in his opening statement this was copied from a copy of which Ralph Wilbur never could find the original until long after the pre-trial, and it is just in explanation of that that this is going in. If after the testimony has gone in counsel thinks he has an additional reason for it not going in evidence, then I think we could have it then.

Mr. Maguire: I have no objection to examination and then subsequently substituting. I don't know what he is going to testify to, because neither my client nor anyone else has been around any of these things.

The Court: I suggest an amendment of the pre-trial order and the introduction of the original in evidence.

Mr. Jaureguy: Very well, then. We do not have the original here, but we will have before the case is over.

The Court: Yes.

Mr. Maguire: That is all right. I make no point of it. [196]

The Court: I think before you proceed to any further subject we will take a short recess.

(A short recess was thereupon had, after which proceedings were resumed as follows:)

(Testimony of Hanover Deady.)

Mr. Jaureguy: Now, this is all the direct examination. If there is to be any cross-examination, I assume that if he cross-examine upon any matters that were admitted subject to objection the cross-examination will be with the same understanding, that it is admitted subject to objection, without our raising the question all the time.

The Court: Yes.

Mr. Grant: And, further, your Honor, may it be understood that by cross-examining on some of those matters we are not waiving our objection to the right to have the Court ruling in our favor later?

The Court: Oh, no. You can drive that hay wagon any place you want to.

Mr. Grant: Very well.

The Court: Except that I do ask you, which I think you are doing, to develop your legal points, so that I will have the basis before me when I come to consider it.

Mr. Maguire: We will try not to lead your Honor into error by keeping quiet.

The Court: I have one exhibit. I have the stipulation. [197] Do you wish that, Mr. Maguire?

Mr. Maguire: Yes, your Honor, I did want to see that, if I may.

Cross-Examination

By Mr. Maguire: Q. Let's see, your grandmother, Lucy A. H. Deady, died in 1923, did she not? A. That is correct.

(Testimony of Hanover Deady.)

Q. And at that time you were approximately twenty-eight to thirty years of age?

A. Yes, sir, that is right.

Q. And at the time of Mrs. Deady's death Henderson Brooke Deady was not here in the city?

A. Yes, he was.

Q. At the time of her death?

A. At the time of her death.

Q. And how long, approximately how long, had he been here prior to the time she passed away?

A. About a month or six weeks, my best recollection.

Q. Now, you spoke of your stepmother. Until you were eighteen years of age you had always known of her, thought of her, as your own blood mother?

A. That is right.

Q. And your feeling toward her was the feeling of a son toward a mother? [198]

A. Yes, sir.

Q. And that feeling has continued, has it not?

A. Yes, sir.

Q. And still exists? A. And still exists.

Q. And existed until she unfortunately passed away, is what I meant to say. And your stepmother, Mary E. Deady, was the wife, and the unestranged wife, of your father at the time of your father's death? A. Yes, sir, that is correct.

Q. Now, you spoke of several conversations which you had had with your grandmother prior to

(Testimony of Hanover Deady.)

the time that your Uncle Paul died. In what year did he die? A. He died in 1920, March, 1920.

Q. And had he been in ill health for sometime prior to that?

A. No, he had not. He died very suddenly.

Q. And, after that, you spoke of other conversations which you had had with your grandmother and in which she mentioned the fact that Dr. Henderson Deady was a sick man. A. That is right.

Q. And had he been ill, as a matter of fact, had he been ill for a considerable period of time before this conversation?

A. That was my understanding, that he had been sick.

Q. Over a course of years?

A. Yes, over several years. [199]

Q. And was it looked upon as an illness which in due course would carry him away?

A. Well, I couldn't answer that question. I don't know. I know that he was supposed to have had ulcers, very sick for a long time.

Q. For about how many years prior to your grandmother's death had that condition existed and been known to you and to her and to the other members of the family—or to you and to her, rather?

A. Well, I couldn't say definitely how long it was, but it seems that it was a good many years, that is the only way I could put it,—four, five, six years, maybe longer.

(Testimony of Hanover Deady.)

Q. As a matter of fact, his health had been such that he was unable to engage in any gainful occupation, hadn't it, for a number of years?

A. Well, that was my understanding.

Q. And, so far as you know, that condition continued, did it not, up to the time of your grandmother's death and afterwards? A. Yes, sir.

Q. Now, when, approximately, was the first conversation which you had with your grandmother in which she made any statements relative to the disposition of her property?

A. Well, I know it was the year of 1920, because it was shortly after Paul died,—I couldn't say whether it was one month, two months, or exactly when—and it was after she had made her [200] will, because she—of course, she had spoken to me about the property off and on, but I take your question to be, had she explained to me about what she was going to do with the property at that particular time?

Q. Well, during your Uncle Paul's life did I understand you upon direct examination to say that she had talked to you about the property?

A. Oh, yes. Nothing definite. She would just say that Matthew and I were going to come into the property, she was going to give us the property some day.

Q. That was before Paul's death?

A. That was before Paul's death.

(Testimony of Hanover Deady.)

Q. After your garndmother died you obtained—or you first heard read a copy of the will, did you not? A. That is right.

Q. And who read the will to you?

A. Joseph Simon, in his office.

Q. Approximately how long after your grand-mother died?

A. Well, it was about a week or ten days. Pretty——

Q. (Interrupting) And you thereupon obtained a copy of the will, did you not? A. Yes, sir.

Q. And read it then yourself, did you?

A. Yes, sir.

Q. And after having read it you consulted an attorney about it, [201] I believe you stated.

A. I did not consult an attorney about it until Mr. Henderson—until Henderson came to me and asked me for money.

Q. And that was the first time that you consulted a lawyer about it? A. Yes, sir.

Q. And what lawyer did you consult about it then? A. Ralph Wilbur.

Q. What year was that?

A. Well, it was either late 1923 or early in 1924, around in there some place.

Q. Did you obtain from him his construction of the will?

A. Yes, I did. I went over, talked over the will, but my point in going to him was to see whether it

(Testimony of Hanover Deady.)

would be all right for Henderson to have the money at that particular time.

Q. And he read the will, did he?

A. Yes; I gave him a copy of it.

Q. You say you gave him a copy of it?

A. Yes; gave him my copy, I think.

Q. And that was given to him for the purpose of his making an examination and rendering an opinion?

A. Yes, in regards to Henderson borrowing the money—or getting the money.

Q. In regard to Henderson borrowing?

A. No, I don't mean borrowing. I mean getting some money to [202] live off of.

Q. Now, I wish you would give me, as nearly as you can recollect, the first time that you had any talk with your grandmother with regard to her property and the disposition of it, when it was, where it was, and who, if anyone, was present.

A. A conversation that I had with her in which she—well, you say when I first had any conversation?

Q. Yes.

A. Well, I am unable to do that, except that I can say that whatever conversation took place took place in her apartment at the Alexandra Court,—took place in her apartment in the Alexandra Court.

Q. That is where the first one took place?

A. Yes, and, as I said before, that was during Uncle Paul's—while Uncle Paul was alive, and she

(Testimony of Hanover Deady.)

never went into detail about it. She just said that Matthew and I were going to come into—she was going to see that Matthew and I came into that property some day.

Q. Was anyone else present at that conversation?

A. I can't recollect whether they were or not, because my best recollection would be that the nurse would be there, Miss Brown, but whether she was at that particular time or those particular times I don't know. She was always with her.

Q. When was the second conversation, and where? Well, before we get into that, about how long before your Uncle Paul's death [203] did the first of these conversations take place?

A. Oh, I couldn't say that. I used to go up and see her on the average of once a month, twice a month sometimes. She wouldn't always speak of it whenever I went up, but she did quite frequently. That is the way I remember it.

Q. Well, about how many times did she speak of it prior to your Uncle Paul's death?

A. Well, my answer to that would be several times. I couldn't say. It is so long——

Q. (Interrupting) Could you give us even an approximate idea? A. No, I couldn't.

Q. Were her statements in response to any inquiry you made?

A. Oh, no. She just was interested in us boys and she used to make those statements to me, that is all, at that time.

(Testimony of Hanover Deady.)

Q. Would it be as many as half a dozen times prior to the time your Uncle Paul died?

A. Well, Mr. Maguire, I couldn't state definitely. It is a long time ago. I couldn't state how many times she spoke of it.

Q. Well, those would be matters of some importance. I am trying to get your best recollection of it.

A. Well, my best recollection would be several times. I couldn't name any number of times. It would be ridiculous for me even to try to.

Q. After your Uncle Paul died when was the first time that you [204] had any conversation with her?

A. Well, I would say very shortly after Uncle Paul died, one of the times when I had gone up to see her, that she made the statement that she had now got her affairs in order and that she had left the property to Matthew and I, then she went on to explain how she had left it.

Q. Let's just have what she said.

A. Well, I can't repeat, word for word, what she said, but she explained to me that she had left the property to Matthew and I and she had left Henderson a certain portion of the property.

Q. What did she say? What did she say about that?

A. She said that she had left Matthew and I the property and she had left Henderson a portion of the property, that if he had children he would come

(Testimony of Hanover Deady.)

into it some day, but that she didn't expect him—or knew, in fact,—I will take that back—she knew, in fact, that he wouldn't have any children. She left him a certain portion of the property if he had any children, and that if he didn't, why, Matthew and I was to come into all of it. She said he was a sick man and couldn't have any children. Also intimated, also said that he wasn't living with his wife at that particular time, and that—that at, although he had been trying to get a divorce from her, that she hoped that Amalie wouldn't give him a divorce. That was the only time that she ever went into detail with me about the property, but she did state on several occasions, after I had [205] visited her, several times during her lifetime, that Matthew and I had nothing to worry about, we was coming into the property.

Q. Let's keep—I don't want to prevent you from testifying to any matters that you may want to, but let's keep to the question that I am asking you. A. I beg your pardon.

Q. Now, was anybody present at that conversation?

A. No, there wasn't, unless the nurse was there; I don't recollect right now.

Q. And can you give us any closer date, any better information, rather, as to how long after your Uncle Paul died was it that this conversation took place?

(Testimony of Hanover Deady.)

A. No, except that it was shortly after she had made her will. I don't know exactly what date it was that she had made her will. That was in 1920.

Q. Well, it is admitted that she made her will in July, 1920. A. Well, it was shortly after that.

Q. Did you bring this subject up?

A. No, sir, I did not.

Q. She brought it up of her own motion?

A. Yes, sir.

Q. What was the occasion for the matter coming into the conversation?

A. I couldn't account for it, except that she was interested in [206] us boys, interested in the family, she wanted to have us interested in what she was doing.

Q. Now, then, after that when was the third occasion—the next conversation, rather? About when and where was it?

A. Well, the rest of the conversations were just as indefinite as they were when Paul was alive; she just made the remarks on different occasions, whenever I went up there to see her. Not every time I went to see her, but occasionally.

Q. You say they were just as indefinite. What do you mean by that?

A. Well, I mean that she didn't go into detail and explain to us—explain to me any further than she had explained, but that——

Q. (Interrupting) Well, what did she say?

(Testimony of Hanover Deady.)

Take the very next one of those occasions.

A. Well, for instance, when I was leaving the apartment she probably—I mean when I was leaving the apartment she would make the remark, “Now, you haven’t got anything to worry about. Just go ahead and make something of yourself, because some day you boys are coming into this property.” She wouldn’t always say it, but it was words like that. I can’t remember what they were.

Q. And did she mention Henderson’s sickness, ill health?

A. Well, I remember she did it that first time, but——

Q. (Interrupting) Well, did she do it again?
[207]

A. Not in reference to the property at all, she never made any reference to Henderson’s ill health.

Q. On only the one occasion did she make reference to ill health? You are sure of that, now?

A. Well, you can’t be sure, Mr. Maguire, fifteen or twenty years afterwards, but that is the way I recollect it.

Q. All right, that is the way I expect you to do, give your recollection. Now, after your grandmother died you say that you got the idea—you looked at the will and got the idea that Henderson’s widow could be prevented from receiving the income?

A. After Grandmother died?

Q. Yes.

A. Oh, no. After Uncle Henderson died.

(Testimony of Hanover Deady.)

Q. You are correct and I am in error. I mean after your uncle died. About how long after his death was it that this idea came to you?

A. Well, that is rather indefinite, too, but it was a very short time afterward.

Q. You know of no memorandum or any way you can determine that approximately?

A. No, I had no memorandum of it at all. I was—shortly after Uncle Henderson died I went down to see Mr. Simon.

Q. Did you write him any letter?

A. Not that I remember of. I am sure I did not.

[208]

Q. Did you get any attorney to write him any letter?

A. Well, I went to Ralph Wilbur on it. He may have written him some letters.

Q. Did you talk to Mr. Oppenheimer about it?

A. I believe he was there at one of our conversations.

Q. You mean at one of the conversations with Mr.— A. (Interrupting) Wilbur.

Q. (Continuing) —with Mr. Wilbur?

A. Yes.

Q. Now, from that time on did Mr. Wilbur or Mr. Oppenheimer represent you and your brother in any claims, demands, or negotiations that were had with Charlotte Howell Deady or her agents or representatives?

A. Yes, Mr. Wilbur represented me.

(Testimony of Hanover Deady.)

Q. Well, Mr. Oppenheimer represented you, too, didn't he?

A. Well, whatever work he did, he did at the instigation of Mr. Wilbur. I mean I was dealing with Mr. Wilbur. He was part of the law firm there.

Q. In other words, the firm of Wilbur, Beckett, Howell & Oppenheimer were representing you?

A. Yes, sir.

Q. But most of your conversations were with Mr. Wilbur? A. That is right.

Q. You were not present at any conference had between Mr. Oppenheimer and Senator Simon and Robert Maguire, were you, [209] in Senator Simon's office?

A. No. I was there when Mr. Robert Maguire and when Mr. Simon and Mr. Ralph Wilbur and myself were there. I don't remember Oppenheimer being there. He may have been, I won't say that he wasn't, but Ralph Wilbur was there.

Q. Are you sure of that? Wasn't it Mr. Oppenheimer? A. No, it was Ralph Wilbur.

Q. Was anyone else there?

A. That is all I remember were there.

Q. Was Mr. Strong there?

A. No, I don't think he was.

Q. Do you remember when that conference took place?

A. Well, it took place about the time when we were trying to get these stipulations. I don't remember exactly what time that was.

(Testimony of Hanover Deady.)

Q. Now, for the purpose of refreshing your recollection, wasn't that several months prior to any preparation of any documents of any kind looking toward any compromise settlement?

A. I couldn't say as to that. I know I talked to Mr. Ralph Wilbur several times before we started any negotiations of any kind, but whether that particular conference was held before the stipulation was drawn up I couldn't say. I know we hadn't signed any, and I don't recollect any stipulations at that time. It probably was before, but I wouldn't say. In fact, I had forgotten all about being down there in that office.

Q. Well, were you not, through your counsel, making a claim [210] that Charlotte Howell Deady was entitled to nothing more——

A. (Interrupting) No, sir.

Q. (Continuing) —from the estate?

A. No, that was—no, sir, I was not. I was making claim that Charlotte Howell Deady was only entitled to the amount of money that Uncle Henderson was getting when he died, and that was all the claim I was making, and that the extra money that Marye was getting and my mother was getting, if they died, should come back to Matthew and I.

Q. Now, you understood my question, did you?

A. I am sure I understood your question.

Q. Well, hadn't you considered and discussed whether or not, if Henderson Deady had died—

(Testimony of Hanover Deady.)

having died within the ten-year period, that his widow could obtain no benefit under any power of appointment and was entitled to no payments at all? A. I never made such a claim as that.

Q. Didn't your attorney make claim of that for you?

A. Well, if he did he misunderstood what I was claiming about it, because I had no such intention. My idea was that she was only entitled, because Henderson did die during that ten-year period, to what he was getting at the time of his death for the rest of her life.

Q. Now, you are very clear about that, are you?

A. That is what my intentions were. That is the reason I went up to Ralph Wilbur. I had no intentions of claiming any other [211] situation.

Q. Well, didn't Mr. Oppenheimer, in your behalf, make claim in the conference which was had in Senator Simon's office that because Henderson had died before the end of the ten-year period his interest in the property was extinguished at the time of his death and he had nothing to pass on to his widow?

A. Not with my knowledge. I am not saying he did not make such a claim, Mr. Maguire, but that was——

Q. (Interrupting) And you never heard that he made any such claim?

A. No, I never heard that he made that, exactly that claim. In fact, I didn't know that Oppenheimer had made any claim at any time.

(Testimony of Hanover Deady.)

Q. Well, did you know that Mr. Wilbur had made any such claim?

A. No, I didn't know that Mr. Ralph Wilbur had made any such claim as that.

Q. Did you know that anyone had made any such claim on your behalf? A. No, I did not.

Q. Had you heard that anybody had made any such claim as that in your behalf?

A. No, I hadn't heard of that.

Q. At any time? A. No, not at any time.

Q. This is the first time you have ever heard it?

[212]

A. This is the first time I have ever heard it.

Q. Well, don't you know, as a matter of fact, that the negotiations of which you have been talking, that you talked about on your direct, were as to whether or not Charlotte Howell Deady was entitled to anything, or whether or not she was entitled to a two-thirds fee ownership of that property?

A. No, all I know is that it was a question in my mind of whether she was entitled to two-thirds of the income of that property, because Henderson died within the ten-year period. Henderson died with an income of six hundred dollars, if my recollection serves me aright, and I was wondering whether that was all she was entitled to for the rest of her life, because Henderson had died within the ten-year period, not that she wasn't entitled to anything.

(Testimony of Hanover Deady.)

Q. Well, why would the ten-year period have anything to do in your mind, or did it have anything to do in your mind, as to whether or not she was entitled to six hundred dollars a month or whether she was entitled to two-thirds of the property?

A. That was the way I understood the ten-year period, because Grandmother had set up certain provisions within the ten-year period, but after the ten years she stated, as I recollect the provisions of the will, that then Henderson was to get two-thirds of the income.

Q. Well, now, I hand you here a copy of the will—it starts on the preceding page with all the operative provisions—— [213] and I wish you would read it and tell me what provision you had in mind when you came to the conclusion that there was a question as to whether she was to have two-thirds of the income, or two-thirds—or six hundred dollars a month, rather, that being what Henderson was receiving at the time of his death?

A. Well, I understood that it was six hundred dollars a month, under that stipulation.

Q. Are you ready now to answer the question?

A. Yes; in the ninth paragraph it states that “the monthly payments directed to be made to my grandsons and the residue of the income directed to be paid to my son, Henderson Brooke Deady, provided for in Item 5 of this will, shall continue for a period of ten years after my death, and there-

(Testimony of Hanover Deady.)

upon and thereafter the net income derived from said lot", and so on and so forth, "shall continue and follow the title and ownership of said real property."

Q. And, as you read that and after having consulted your attorneys, you came to what conclusion?

A. I came to the conclusion before I ever consulted my attorneys that Henderson died—having died within the ten-year period, was only entitled—I mean died within the 10-year period, was getting so much money, and therefore his wife, who was then living, would be only entitled to the income he was getting at that time for the rest of her life.

Q. Irrespective of what the income of the property was?

A. Irrespective of the income of the property. It might have [214] been more or less, but at that time it was six hundred dollars.

Q. Mr. Bailiff, I will ask you to hand these two papers to this witness. I will ask you to state if you don't recognize that as a copy of a letter addressed by your counsel, Wilbut, Beckett, Howell & Oppenheimer, to Senator Joseph Simon, of date July 10, 1933, with regard to your claims?

Mr. Jaureguy: Object to that on the ground that we have been required to produce, or we did, in response to what we understood the ruling of the court was, produce at pre-trial all the documents that we were going to bring into this court for trial,

(Testimony of Hanover Deady.)

and this was one that was brought into pre-trial by counsel.

The Court: The objection is sustained.

Mr. Maguire: Well, if your Honor please, I would like to be heard on that, if your Honor will permit.

The Court: Yes. [215]

The Court: Well, I think that the difficulty here arises from the fact that I have allowed some matters to go into the record without ruling on them, ruling as to inclusion or exclusion, which are now brought into controversy by cross-examination. As I read the pre-trial order, there is no issue as to this controversy about Charlotte Deady or the matter that is now brought up. It is true there is that exhibit offered and rejected, but there is no square-out allignment upon the proposition of what that compromise offer was, and, as I view it at the present time, it is not an issue in the case.

Mr. Grant: If your Honor please, just one word. That document of itself does not tend to prove or disprove any issue in the case. The fact is, however, that on the cross-examination of this witness he has made a statement, we believe disproved by the document, for the purpose of impeaching his credibility. We should be allowed to introduce the document. Your Honor might rule that it was too remote and should not be allowed for the purpose of impeaching him or testing his memory, but you should not

(Testimony of Hanover Deady.)

rule it out because it is not in the pre-trial [224] order, because if we were in claiming that this document of itself were something that proved what the will meant, the will was, then we would be in a far different position, but I think it is a matter for your Honor to determine whether or not we may properly on cross-examination go into the truth or falsity of a statement as to the claim he was making. If we might go into it at all, then it would be a wrong interpretation of our pre-trial rules to say that for the purpose of doing that one thing we could not submit to him a document which might refresh his memory and which we believe is contrary to the statements he made as to the position he then took.

The Court: Well, as I say, I don't see that this is reserved in the pre-trial order, this question, at all. It is true that I did admit the evidence subject to future ruling, and it may be that I will rule it out. Now, if it is not material, then you are bound by the answer of the witness. It doesn't make any difference what proof you could adduce to say that his memory was not correct, or that he was telling a falsehood—if the answer is immaterial to the issue, then you are bound by the answer of the witness. You can't either impeach him by some other document nor can you produce testimony to prove he is wrong, if the answer is not material to the issue. That is the ordinary rule of all proceedings. You take your chances on cross-examination, if you ask

(Testimony of Hanover Deady.)

a man something that is not material to the issue, for whatever purpose. [225]

Mr. Maguire: Well, your Honor, if a matter is brought out on direct examination, may we not cross-examine upon it? Are we bound by his answer on direct examination?

The Court: Well, as I say, it all depends on whether it is material to the issue. Now, as I say, I do not think that this pre-trial order reserves the question for trial which is now being debated, that is, this question of this compromise. I doubt that the position of Charlotte Deady is brought into question by the pre-trial order. Now, that is just an offhand interpretation. If I eventually rule this evidence out I will rule it out because it is not material on direct examination, rule it out because it is not material to the issues as laid by the pre-trial order. Upon that, then, you are bound by that ruling. If it is not material, why, then you can't cross-examine on it. But, this informal way that we are proceeding is what has gotten us into the difficulty.

Mr. Maguire: I appreciate that, your Honor, and I suppose the only thing we could then do would be to ask your Honor for a ruling at this time upon the materiality of the testimony with regard to this offer of compromise and his alleged actions in regard thereto, because obviously it would be wholly unfair for us to be penalized because we have been proceeding here, both Court and counsel, in a more

(Testimony of Hanover Deady.)

or less unusual way. So, then, as far as this particular matter is concerned, we would ask your Honor to rule upon our objection as to the [226] materiality both of that exhibit and of testimony with regard to it.

The Court: I will accept that ruling. It is now ten minutes after five. I will suspend for this evening. [227]

Thursday, January 23, 1941, at 10:55 o'clock A.M., the trial of the above entitled cause was resumed, as follows:

The Court: Go ahead.

Mr. Freed: Your Honor, we have had a conference, the attorneys on both sides, and we are willing, representing the defendants, if your Honor wishes it or your Honor is willing, that this exhibit that Mr. Maguire spoke of, or the letter, should be added as a pre-trial exhibit at this time, but we would like, however, at the same time,—we think that there should be introduced with it the letter that was written by Joseph Simon transmitting this letter to Mr. Maguire.

The Court: The matter coming up in that way, I will permit you to amend your pre-trial order in any way that you can amend it by agreement. If it is not done by agreement I shall rule strictly in accordance with the principles that I have laid down in this matter of pre-trial procedure. I think

(Testimony of Hanover Deady.)

you are all well advised of what those are, and I take it you are all antagonistic to it. I will explain now, since this has come squarely before me in the course of a trial, why it is necessary, in my opinion, to handle the matter in this way. If pleadings, as contemplated by the rules, are the only guides to what is to be tried, then at the trial everything can come in and there are no lights upon which the Court can guide in seeing what is competent or what is not competent, or what is [229] material and what is not material testimony, or documents. If we go to a pre-trial procedure, then that must be all-inclusive, and the Court has advised the attorneys, from time to time, that since the pre-trial procedure was held just prior to trial the attorneys should be fully advised as to what contentions they were going to raise, in order that everybody should know what the issues were. Mr. Maguire yesterday seemed to be much abused because of the fact that the document was to be ruled out. I call your attention to the fact that unless I am to make the trial all-inclusive the documents must be brought to the attention not only of the Court but of the other side. It is not the first time that documents have been excluded by courts because they have not been noticed in the pleadings under the issues. I have had some excluded myself when I was practicing,—I have no doubt that all counsel have,—that is, pieces of testimony on which they rely getting into the record. Mr. Maguire claimed surprise.

(Testimony of Hanover Deady.)

I think that under the formal pre-trial procedure the surprise might well be on the other side. That was the first time that the document was brought to their attention that they had not known about previously, and if I am required to rule on the question I will strictly adhere to it. I think there is no manifest injustice shown and that I should be required to abide by the document that the attorneys are agreed does settle the issue. That is ruling squarely. I say that at this time, because there can't be any doubt in my mind as to what necessarily [230] must follow from holding pre-trial procedure. If you don't follow that rule, then the issues will come in at large and everybody will be surprised. Now, it may be that the Circuit Court of Appeals will take a different viewpoint, and when they do then we will try cases at large. But I am unwilling to follow any other guides than strict application of the pre-trial order. I should be glad to be advised, and any time I am required to do this I am going to put the thing squarely up to the Circuit Court of Appeals on that basis, but otherwise, unless there is a strict construction of the pre-trial order, neither the Court nor the attorneys will be advised of what they are trying. I think in this particular instance that there was notice given as to the raising of this particular issue. If Mr. Maguire is to rebut that with other testimony, why, that field is perfectly open. If he wanted to rebut any implications that arose from

(Testimony of Hanover Deady.)

that document, then I should beware to exclude it from the pre-trial order.

Now, if you gentlemen will dictate any amendment that you wish to the pre-trial order to include it by consent, the Court will recognize it.

Mr. Jaureguy: Might I say one other word, in view of something your Honor said? We do not want to wish to be understood as agreeing to waive the rules for any future documents they might bring in. We are referring to this particular document.

The Court: That is the ruling of the Court. You make your [231] amendment now to the pre-trial order by consent and the Court will still view the pre-trial order as governing the course of this trial.

Mr. Freed: We consent to that later——

The Court: (Interrupting) Well, I want you to make an amendment and include it in the pre-trial order at the present time; dictate it.

Mr. Freed: Let them suggest the amendment they wish and we will——

The Court: (Interrupting) I think that I had better make someone available in my office and you can dictate the amendment to the pre-trial order. I will take a short recess while you do that.

(A short recess was thereupon had, during which the pre-trial order herein was amended, after which proceedings were resumed as follows:)

(Testimony of Hanover Deady.)

Mr. Jaureguy: Mr. Deady take the stand again?

The Court: Yes.

HANOVER DEADY,

one of the defendants herein, thereupon resumed the stand as a witness in behalf of the defendants and was examined and testified further as follows:

Cross Examination

(Resumed)

Mr. Maguire: Before proceeding further with the cross-examination of this witness, the plaintiff now moves that there be [232] stricken from the record all testimony of this witness with regard to any negotiations had with Charlotte Deady or any conversations had with his counsel or Mr. Simon, after the death of Henderson Brooke Deady, with regard to any compromise settlement or claims between Charlotte Howell Deady and this witness and his brother, and all testimony with regard to his action or failure to act with regard to any offer of compromise or settlement based upon any alleged ignorance on his part that Charlotte Howell Deady was making any claim to a two-thirds interest in the fee to the property in question, on the ground and for the reason that neither the pleadings nor pre-trial order raise any issue with regard to any act or failure to act on the part of Charlotte Howell Deady, but are based upon, and solely upon, al-

(Testimony of Hanover Deady.)

leged actions and statements of Henderson Brooke Deady.

The Court: The position, as I understand it, in the pre-trial order is that the witness was **relying** upon statements of Henderson Brooke Deady and that there were certain controversies, of which the refusal of this offer was one, that therefore removed it from the case.

Mr. Maguire: My motion is not directed to that, your Honor, at all. As I say, the answer and the pre-trial order itself cover the question of any alleged estoppel or construction, contemporaneous construction, of the will, under the rights of the party, espoused by Henderson Brooke Deady. We objected as to the relevancy and competency of that, but that is plainly in [233] issue. But now what I am talking about is his statement and testimony heretofore given with regard particularly, for instance, to the fact that if he had known that Charlotte Howell Deady was making any claim to a two-thirds fee he would have signed the document, which is not tendered by the pleadings and not mentioned in the pre-trial order, and it, therefore, is not an issue. You see, the——

The Court: (Interrupting) Yes, I understand the distinction. I think that that testimony tends to rebut his claim of reliance upon the statements of Henderson Brooke Deady, if it does anything. I therefore think the testimony is competent. [234]

(Testimony of Hanover Deady.)

Mr. Maguire: Then all I can do is renew my motion.

The Court: Yes. The motion is denied.

Mr. Maguire: Now may I have those two letters, Exhibits 9 and 10.

Q. I hand you Exhibit 9 and ask you to examine the same. I might state, that is the original of the carbon copy which was handed you yesterday afternoon. Now, at that time the firm of Wilbur, Beckett, Howell & Oppenheimer and Mr. Ralph W. Wilbur were your counsel, were they not?

A. Yes, sir. [235]

Q. Now, Mr. Deady, on your direct examination you testified that at the time that you went to Mr. Wilbur and had him examine the will of Lucy A. H. Deady you did not understand or could not understand as to whether she was to continue to get the amount that he, Henderson Brooke Deady, was getting, or exactly what amount she was to get, or for how long. What doubt was there in your mind as to the length of time that she was to get anything?

A. Well, I didn't have any definite idea as to what the whole thing was. I was trying to find out when I went to Ralph Wilbur.

Q. Well, what question arose in your mind at that time as to the period of time in which Charlotte Howell Deady would be entitled to receive anything under the will?

(Testimony of Hanover Deady.)

A. Well, I don't really recollect, except that possibly it had to do with the ten-year period.

Q. In what regard? What do you mean by that, ten-year period? As to whether she could get it beyond the ten-year period?

A. Yes, as to whether she could get anything beyond the ten-year period. I suppose that is what I meant. Of course, I just went up to——

Q. (Interrupting) Of course, I am not interested in what your [238] supposition is, or was. I want to know what arose in your mind or what question arose in your mind or what you meant as to the ten-year period?

A. Well, my idea of the whole thing, as far as the ten-year period or not, was as to how much she was supposed to get, because Henderson died with a certain amount of money, and I didn't know whether she was entitled to two-thirds of the income, or whether she came into it, or anything about it. I was wholly at sea about it, and that is the reason I went to Mr. Wilbur.

Q. Yes, but that does not answer my question. What did you have in mind as to the length of time that she should be entitled to receive anything, and what did the ten-year period have to do with that?

Mr. Jaureguy: I object to that question on the ground that he has answered it, and counsel is——

The Court: (Interrupting) Objection overruled.

A. Well, as I have stated, as far as the ten-year period was concerned, I didn't know anything

(Testimony of Hanover Deady.)

about it. I—if I can answer it this way, I didn't know whether she was entitled, for how long a period, to receive six hundred dollars, or whether she was to receive any. I didn't know anything about it, the way the will read, and I was trying to find out about it. It wasn't a question in my mind as far as any particular period. I didn't even know whether she was entitled to anything, as far as that is concerned. I didn't know whether she was entitled to six months, [239] or eight months, or two-thirds, or anything. I was trying to find out, that is all. There wasn't anything definite in my mind, trying to take anything away from her. If she had something coming it was perfectly all right with me. That is what I was trying to find out.

Mr. Maguire: Well, didn't you raise any question at any time, or your attorney raise any question for and on your behalf, on the proposition that Henderson Deady, having died within the ten-year period specified in the will, that his widow—he could not exercise that power in favor of the widow?

A. Oh, no, there wasn't any question that he could not exercise the power. There was a question of how much and for how long. I didn't understand for how long. We talked those things generally over. I couldn't remember definitely. As far as that is concerned, we had conversations in Mr. Wilbur's office about it, and that is all I can recollect about it. I left it entirely up to him.

(Testimony of Hanover Deady.)

Q. Well, were you present at any conversation in Mr. Simon's office at which Mr. Maguire and one of your attorneys was present?

A. Yes, I recollect being there at one time in regards to these stipulations.

Q. Who was present, as you recollect?

A. Well, I recollect that you were there and I was there and Mr. Joseph Simon and Mr. Wilbur. That is my recollection of it. [240]

Q. Was Mr. Oppenheimer there?

A. I don't remember that. He could have been. I don't remember.

Q. Was Mr. Strong there?

A. I don't remember that. I don't remember him being there. He may have been. He could have been. I don't remember of him being there.

Q. Can you give us approximately the date of that conference?

A. No, I can't.

Q. Was it in the summer of 1933?

A. Well, it must have been in 1933 some place, because this took place after Henderson died. If I recollect, a date in '33.

Q. Well, these negotiations continued on until into 1935, didn't they?

A. On this particular stipulation?

Q. As to compromising the differences of anyone, the claims of right between Charlotte Howell Deady and yourself and your brother Matthew?

A. I wouldn't want to say the date. I know they

(Testimony of Hanover Deady.)

did continue for quite a while. I didn't realize they lasted that long.

Q. Well, at the conference held in Mr. Simon's office, at which you were present, did you hear anyone make any claim that Charlotte Howell Deady was entitled to receive none of the income?

A. No, sir, I did not, and if they did and they were representing me I certainly had no intentions of that fact at all, because it states in the will she should have a certain amount of income [241] for the rest of her life.

Q. Well, if the will says she should have income for the rest of her life, then how did any question arise in your mind as to the period for which she should receive anything?

A. Well, I am trying to tell you if I said that I was just trying to bring up the subject as to what she should get, or how long, and everything about it, according to the will. It wasn't with the idea of estopping what she was going to get.

Q. Do you remember either Mr. Oppenheimer or Mr. Wilbur claiming that under their construction of the will if Henderson Brooke Deady died within the ten-year period after his mother's death he could not exercise the power and his widow would be not entitled to any income?

A. I don't remember any such thing. I am not saying, Mr. Maguire, that they might not have said it, but I don't remember any such thing, because I had nothing in my mind like that.

(Testimony of Hanover Deady.)

Q. Now, with regard to Charlotte Howell Deady having made a claim or asserting—when I use the word “claim” I don’t mean putting anything in writing, but you now testify that you never heard from anyone that Charlotte Howell Deady was asserting that she owned a two-thirds interest in that property?

A. I heard a rumor that there was going to be, maybe, a test case to find out whether she did own it or not. I didn’t know that she was personally making any claim, but that is what I heard, that there might be a test case. [242]

Q. And when was it that you first heard that?

A. It was along in 1935, I believe, my best recollection of it.

Q. I want to ask you whether or not, prior to April 30, 1934—and I emphasize the year 1934, so we will have no mistake of it—you had not been informed that Charlotte Howell Deady might or would make a claim for a two-thirds fee simple in that estate?

A. I never heard at any time that Charlotte Howell Deady was going to make a claim for two-thirds of the property itself. I did hear rumors that there might be a suit brought. The fact of the matter is, I heard that you yourself had made a statement that it was too bad that Charlotte Deady died or there would have been a suit brought in this case by her.

Q. Now, I am referring——

(Testimony of Hanover Deady.)

A. (Interrupting) I don't know, Mr. Maguire, I wouldn't know the date, nor anywheres near it. I wasn't even——

Q. (Interrupting) Charlotte Howell Deady didn't die until 1935, did she?

A. That is correct.

Q. All right, now, what I am asking you about, and I will call to your attention directly, whether or not as early as April 30, 1934 you had not been apprised, apprised by Robert H. Strong, to the effect that Charlotte Howell Deady was contemplating or might make a claim for a two-thirds interest in the property itself?

A. That is who I heard it from, that there was probably going [243] to be a test case in this by Charlotte—that the attorneys were trying to make a test case about it. What year it was I don't know, but it was during her lifetime.

A. Oh, yes.

Q. And the question was as to whether or not she had a two-thirds interest in the estate, in the property?

A. Well, naturally, that is what she was bringing it for if she brought one; but let me add this, I also understood her to say that she understood what Grandmother Deady wanted and she wouldn't bring such a suit, by Mr. Strong.

Q. I am asking you about your conversation with Mr. Strong. And he told you that prior to April 30, 1934?

(Testimony of Hanover Deady.)

A. Oh, yes. I wouldn't say the date, but I know he told me that.

Q. That was before Charlotte died?

A. That is correct.

Q. And while the negotiations for compromise were going on?

A. Well, I didn't know that they extended to 1935, but if they did I naturally——

Mr. Maguire: (Interrupting) Mr. Bailiff, may I have the exhibit—well, here it is.

Q. Well, I will ask you this question: Wasn't it prior to the second of November—the 22nd of October, rather, 1934?

A. I wouldn't answer that directly. If the records show it, it must have been. I am not saying it isn't, Mr. Maguire. [244]

Q. Wasn't it prior to the time that you declined to sign Defendants' Exhibit G?

The Court: Does the witness know these by numbers? Will you present the document to him.

Mr. Maguire: (To the Bailiff) Will you present the document to him.

A. Now, what was the last question, again?

Mr. Maguire: Q. Didn't Mr. Strong inform you, prior to the 22nd day of October, 1934, that Charlotte Deady was asserting a claim to an undivided two-thirds interest in this property?

A. Well, the answer would be that, personally, of my own knowledge, I don't remember. If this shows that he did, why, naturally that is true. I

(Testimony of Hanover Deady.)

was in and out all the time, I was working, I was busy; I can't remember all those things. If you have got records to show that that is true, why, it is true.

Q. You will not say whether it is true or not?

A. I don't remember.

Q. It is a matter of fact, however, that prior to the time these negotiations for compromise blew up Robert Strong had informed you that Charlotte Howell Deady was asserting a claim to a two-thirds fee simple estate or title in this property?

A. Mr. Bob Strong informed me that there might be a test case, and that is all that I know of. Now, of course, I assume that Charlotte was the one bringing the test case, there is no question about that, but that is the way he expressed it to me. [245]

Q. But that was before the negotiations for compromise blew up, wasn't it?

A. Well, to my best recollection, I think they were.

Mr. Maguire: That is all, thank you.

Redirect Examination

By Mr. Jaureguy:

Q. Now, I want to get this straight. You said that Bob Strong also told you something further about Charlotte's position, and what was that?

Mr. Maguire: No, just a moment,—the witness didn't say that Bob Strong said that.

The Court: Oh, yes. Yes, he did, Mr. Maguire.

(Testimony of Hanover Deady.)

Mr. Maguire: I beg your Honor's pardon. I thought I listened very carefully to that. He said he had also heard, but I didn't understand him to say Mr. Strong said that.

The Court: You refer to the record. He said Mr. Strong told him.

Mr. Maguire: Well, I certainly didn't get it that way.

Mr. Jaureguy: Q. Now, you give that whole conversation, now.

Mr. Maguire: Well, we object to that as being irrelevant, immaterial and incompetent, because it is not competent to prove, in view of his testimony on direct examination in which he said that he had never heard of any such claim, to prove that he had heard of such claim. Now, what he said about other matters [246] isn't relevant and material.

Mr. Jaureguy: Well, of course, on other matters entirely, but you can't cross-examine a witness on a conversation without allowing the whole conversation on that subject matter to be brought in, and that is what we are entitled to do and that is what I am asking him for.

The Court: He may answer.

A. My recollection of that is that Mr. Robert Strong told me that there would be a test case, or there was some talk of a test case being brought by attorneys in the East against the estate, and they had tried to prevail upon Charlotte Deady and she

(Testimony of Hanover Deady.)

mentioned the fact that she wouldn't do it, because she knew what Grandmother Deady's intention was with regards to the will, she was only entitled to have the income.

Mr. Jaureguy: Q. Now, at the time that Paul Deady died was he living with his wife?

A. He was not, no, sir.

Q. Can you give us an approximation of how long they had been living separate?

A. No, I can't, except that she had filed a divorce proceeding in California and hadn't taken out an interlocutory decree. It was over a period of—I wouldn't want to say. It was several years, at any rate, they hadn't been living together.

Q. And prior to his death she had filed these divorce proceedings, you say? [247]

A. Beg your pardon?

Q. And prior to his death she had filed these divorce proceedings, you say?

A. Prior to Paul's death?

Q. Yes.

A. No, my understanding was that she didn't file any—oh, yes, prior to his death she had made these divorce proceedings. Is that what you said?

Q. And she had been living away from Portland how long, approximately?

A. Oh, quite a while. I wouldn't want to say. I think as high as ten years, if I remember.

Q. You spoke about a Miss Brown, a nurse, being present at the Alexandra Court, some of the

(Testimony of Hanover Deady.)

times that you spoke to your grandmother. Do you know anything about Miss Brown's whereabouts now?

A. Yes, the last I remember she was convalescing in a hospital at Salem.

Q. And what was the nature of her illness?

A. Well, I understood, a nervous breakdown.

Q. That is, mental trouble of some kind?

A. Yes, that is what I understand.

Mr. Jaureguy: I am going to ask a question that I asked on direct, and I believe it becomes competent on account of the cross-examination. I want your Honor to know I am not trying to [248] slip it over.

Q. Now, when you went down to Joseph Simon's office immediately after, or as soon after, the death of Henderson Brooke Deady, I wish you would state what Joseph Simon told you.

Mr. Maguire: Object to that as being wholly incompetent, irrelevant and immaterial. I haven't inquired of this witness as to any conversations he had with Joseph Simon.

Mr. Jaureguy: Well, he has inquired of this witness as to the ideas that he got with respect to the income to be paid, and that he examined the will, and I think we are entitled to show the source where he got these ideas that he later communicated to Mr. Wilbur, if he did.

The Court: Well, as I understood the theory of

(Testimony of Hanover Deady.)

this, it was that he got his ideas from Henderson Brooke Deady.

Mr. Jaureguy: No, that's the ideas on the ownership of the property. We are talking now about the ideas of the widow getting an income after his death and why he went to see Mr. Wilbur and started in this correspondence that they have put in evidence here. We don't claim anything from Mr. Simon about the ownership of the property,—I mean in this respect, with respect to this conversation, we don't—but it is an entirely different subject, and that is the income that he raised the question about.

The Court: Well, I think it is opening up a large question, but I will permit you to inquire, subject to cross-ex- [248½] amination.

Mr. Jaureguy: Q. What was said on that?

The Court: I don't want anything except relating to this particular subject.

Mr. Jaureguy: That is right.

The Court: I want the witness to understand that.

Mr. Jaureguy: That is right. That is, relating to the subject of the income that was being sent—

Mr. Maguire: (Interrupting) May it be understood that our objection will run to this course of testimony, without the necessity—

The Court: (Interrupting) Yes.

A. This was, of course, at a time shortly after Henderson died, as I understand your question—

(Testimony of Hanover Deady.)

Mr. Jaureguy: (Interrupting) Yes, that is right.

A. (Continuing) —and I went down to see Mr. Simon, just in a general way, just to talk to him about the general situation, and in our conversation there he made the remark that they were getting too much money back there, which I took, of course, to be both Amalie and Charlotte Deady, and I didn't know really what he meant and I asked him what we should do about it, and he said, "I can't do anything, Hanover. I am the executor of the will. You will have to see somebody else"—and so that was what started my train of thought. I didn't even get what he meant, and that is the reason I went to Ralph Wilbur, to find [249] out just exactly, after I had looked over the will and kind of wondered what it was all about.

Mr. Jaureguy: That is all.

Mr. Maguire: I now move to strike the testimony of this witness as to the conversation this witness had with Joseph Simon, and particularly with regard to what Joseph Simon said his thoughts and opinions were, as being wholly immaterial, irrelevant and incompetent in this case, and not binding upon plaintiff, not tending to prove or disprove anything in this case, purely hearsay, but not within any exception to the hearsay rule.

The Court: The theory on which this testimony is admitted is the extent to which the witness placed a reliance on the statements of Henderson

(Testimony of Hanover Deady.)

Brooke Deady and whether or not, as I understand it, he did rely on them to the extent of taking other positions that he would not have taken under other circumstances. I think that the statement of Mr. Simon is not of weight otherwise than that, except as to the effect it had on the mind of the witness.

Mr. Jauregui: That is the entire purpose of it.

The Court: Yes. So, therefore, I——

Mr. Jauregui: (Interrupting) In offering it, I did it on the assumption that it was not admissible on direct, because your Honor ruled it out; it was only admissible on account of what was brought out on cross examination, and on cross examina- [250] tion he tried to get this witness to say that he had certain definite theories, right down to the very dollar, and in order to show what the state of his mind was and the source of his information, otherwise the inference might be drawn that Mr. Simon went and laid out an entire plan and his whole theory, and I wanted to show just exactly what he said, because this counsel attempted to get the witness to say right down to a dollar and the year and the amount of money. That was the only purpose of it, and it was entirely on account of this cross-examination.

Mr. Maguire: May it please your Honor, the question was asked on direct examination about some testimony given, and my cross examination of this witness was limited to that particular matter.

(Testimony of Hanover Deady.)

Mr. Jaureguy: I am not questioning the propriety of the cross-examination at all.

Mr. Maguire: I am not suggesting you are.

The Court: I will settle this. I will deny the motion.

Mr. Maguire: It is now twelve-thirty. I may say to your Honor that I only have one more question I want to ask on recross. Unfortunately, however, it must be based upon the transcription of a shorthand note I made of an exhibit hurriedly last night. It will take me a moment or so to get it out so I can read it accurately. I am willing to do it now, if your Honor will give me just a moment, or I can do it afterwards.

The Court: No, we might as well do it now. [251]

Mr. Maguire: It won't take me but a moment.

Recross Examination

Q. Now, I want to ask you further with regard to the conversation had with Robert H. Strong a few days prior to April 30, 1934. I ask you whether or not you did not say to him, in substance and effect, that you were disturbed about the possibility of Mrs. Deady laying claim to two-thirds interest in the property, and at that time did not Mr. Robert Strong say to you that such was very likely to be the case, or words of like tenor and effect?

A. I never made any such statement as that. My testimony is that he did tell me at one time—I am not trying to say the date, or when it was; it was up in his office—that there would be—that Charlotte

(Testimony of Hanover Deady.)

Deady's attorneys were trying to get a test case; she wouldn't listen to it, because she knew what Grandmother Deady's intentions were.

Q. And was that all the conversation?

A. The whole conversation. My recollection of it was of the income, and Mr. Strong told me, then and there, that Charlotte Deady was entitled to two-thirds of the income of that estate, under the will, he was going to see that she got it. I remember that part of it. The fact of the matter is, the whole argument was on the income, as I remember it, and then just telling me about this test case might come up.

Q. Was there anything said by you as to whether or not Charlotte Howell Deady's heirs, when she died, might make claim to a two- [252] thirds interest in the estate?

A. I have no recollection of it at all. I am sure there didn't.

Q. You are sure it didn't?

A. Pretty sure there didn't. I have no recollection of it at all.

Mr. Maguire: That is all, thank you.

Mr. Jaureguy: That is all.

(Witness excused.)

The Court: Suspend until two o'clock.

(Whereupon, at 12:30 o'clock P. M., Thursday, January 23, 1941, a recess was had until 2:00 P. M.)

[253]

AFTERNOON SESSION

2:05 P. M.

Mr. Freed: We will call Miss Murch.

JESSIE MURCH

was thereupon produced as a witness in behalf of the defendants herein and was examined and testified as follows:

The Clerk: Please state your name.

A. Jessie Murch.

The Clerk: Spell the last name.

A. (Spelling) M-u-r-c-h.

(The witness was then duly sworn.)

Direct Examination

By Mr. Jaureguy:

Q. Miss Murch, where do you live?

A. I live at the Alexandra Court Hotel.

Q. And you have lived in Portland for some time, have you?

A. Many years.

Q. Now, were you related to Mrs. Lucy A. H. Deady?

A. Mrs. Deady was my aunt, my mother's sister.

Q. And were you acquainted with her during her lifetime?

A. Oh, I lived with her many years.

Q. And could you tell us when you lived with her?

A. It was in the fall of 1893, I think, that I went to live with Mrs. Deady, after Judge Deady's death.

(Testimony of Jessie Murch.)

Q. And how long did you live with her? [254]

A. Well, we were in the same apartments some six or seven years.

Q. And after that—

A. (Interrupting) And after that, at two or three different times, I lived in the same hotel, but not in the same apartments.

Q. And what hotel was that?

A. It was—then it was known as the Hobart-Curtis. It was where—it is now The Jeanne d'Arc.

Q. And could you tell us about when you and she lived at the Hobart-Curtis?

A. Well, I lived with Mrs. Deady at that building over here which was then known as The Hill, and later it was changed to The Hobart-Curtis.

Q. That is, is that where you were living from 1893 for six or seven years, when you say you lived with her? A. Yes.

Q. And thereafter in the same building but in different apartments? A. Yes.

Q. And how long did that continue?

A. Oh, several years; three or four, I think.

Q. And then thereafter where did you live?

A. Thereafter I went to the Alexandra Court, in May of 1922, and I lived there—I am still living there, but I was there at the time Mrs. Deady died.

Q. And where did she live during that time? [255]

A. She lived at Alexandra Court, in another apartment.

(Testimony of Jessie Murch.)

Q. Now, during that period after you ceased living in the same apartment together did you see her? A. Oh, I saw her very frequently.

Q. Could you give us some idea about how frequently?

A. When I went to Alexandra Court, after I went there in 1922, I was pretty near—I practically went to see my aunt every day.

Q. So I take it, then, that at least from 1893 on you saw your aunt very, very frequently?

A. Yes.

Q. And were you acquainted with her children?

A. Oh, yes.

Q. And who were they?

A. Well, Ned,—Edward Deady, and Paul, and Henderson.

Q. And with her grandchildren? A. Yes.

Q. You were acquainted with them, too, you say? A. Yes.

Q. Now, at any time during the time from 1893 on did Mrs. Deady, Mrs. Lucy Deady, your aunt, ever discuss with you how she desired or intended to have her property go after her death?

Mr. Maguire: Object to that as being incompetent evidence to prove any issue in this case, either to prove intent—or further incompetent as it is not receivable to vary, alter, or [256] to construe the last will and testament of the testator, Lucy A. H. Deady.

(Testimony of Jessie Murch.)

The Court: This is a preliminary question. She may answer this question.

A. Yes, Mrs. Deady——

Mr. Jaureguy: (Interrupting) I think you may answer it Yes or No.

A. Yes.

Q. And could you give us an idea as to the time, say the first time that she discussed that?

Mr. Maguire: May we have the same objection?

The Court: She may answer.

A. Well, all through the years she spoke of the property going to her grandsons eventually.

Q. Well, I mean at the time. Now, I wish you would state——

The Court: (Interrupting) That last answer is stricken.

Mr. Jaureguy: Except the part “all through the years”.

The Court: Well, the whole answer is stricken. Proceed and ask her again.

Mr. Jaureguy: Q. The question that I would like to have you answer, as nearly as you can, Miss Murch, if you can remember about when the first time that she began talking on that subject was?

A. Well, I don't know that I can remember exactly the first time, but she frequently spoke of her desire for it to go to Hanover—— [257]

The Court: (Interrupting) Just a moment, please. Just confine your answer to time.

(Testimony of Jessie Murch.)

Mr. Jaureguy: Q. We are asking for the time.

A. Yes.

Mr. Maguire: We move that the answer that she made be stricken.

The Court: Well, I don't think there was any. I think I stopped the witness in time.

Mr. Jaureguy: Q. Well, now, you started to live with her in 1893. Could you give us an idea how long after that, or any way you can fix, perhaps, the first time that she spoke about it, if it is possible for you to do it?

A. I don't think it is possible for me to fix the time, after so many years.

Q. Nor even the approximate time? A. No.

Q. Now, I wish you would tell us what she said on those occasions.

Mr. Maguire: We object to this question on the ground that it is wholly incompetent to prove or disprove any issue of this case, that it is hearsay, it is incompetent, because the testamentary intent of the testator may not be proved by oral testimony, nor can a will be construed by oral testimony as to what the testator may from time to time or at any time have said with regard to intent or desire. [258]

The Court: Do you wish to argue at some length now?

Mr. Jaureguy: Well, it would be rather an extended argument. Some of the evidence has already gone in. I would say if we can defer it until some later time,——

(Testimony of Jessie Murch.)

The Court: (Interrupting) The evidence is rejected. It may be put in the record under the rule. I think I have ruled each time definitely on that.

Mr. Jaureguy: No, I did not so understand. I understood that you reserved ruling on it.

The Court: Well, this question I don't think I am in much doubt on. You may make an argument on it, if you wish. I think I ruled on the previous evidence on this particular question before definitely.

Mr. Jaureguy: You mean rejecting it and putting it in under the rule?

The Court: Yes.

Mr. Jaureguy: Well, the argument that I make will be more extensive than what I have in the books here.

The Court: Well, you said, Mr. Jaureguy, that you wanted to argue the question. Now, I will do either way you wish. If you want to argue it, I will reserve ruling until you argue it.

Mr. Jaureguy: Well, I would prefer that, although I will say that on just a few moments notice, if your Honor desires to have argument, I will be glad to do that. But I would prefer that you reserve ruling until later. [259]

The Court: Then the evidence will go in subject to the objection. I will rule later.

Mr. Jaureguy: Q. Now, do you remember the question, Miss Murch?

A. You asked me the first time, if I could re-

(Testimony of Jessie Murch.)

member the first time that Mrs. Deady said this to me.

Q. Since you answered that question, do you have a different answer? Do you recall the first time? A. No.

Q. The question now is, state what was said on these various occasions.

Mr. Maguire: I take it that it is not necessary for me to renew my objection.

The Court: No.

Mr. Maguire: That we may have a running objection with regard to any statements with regard to intent, testamentary intent, or disposition of the property.

The Court: Yes.

A. Well, I don't know that I could say——

The Court: (Interrupting) Any declaration of the testator.

Mr. Maguire: Yes.

A. Well, Mrs. Deady expressed the opinion that the property would eventually go to Hanover and Matthew.

Mr. Jaureguy: You say she frequently expressed that opinion?

A. Yes, that was it. [260]

Q. Now, do you remember when Paul Deady died? A. Yes.

Q. Now, would you say whether or not she expressed that opinion prior to his death?

A. Yes.

(Testimony of Jessie Murch.)

Q. Did Paul Deady ever have any children?

A. Not any.

Q. And after his death did she ever express herself?

A. Yes.

Q. And after his death what did she say?

A. She said it was between—may I say this, that it was between May, 1922 and sometime before her death in 1923 that she said to me that eventually the property would go to Hanover and Matthew.

Q. Now, did she ever express any expression of feeling that she might have with respect to Hanover and Matthew, or either of them?

A. Oh, yes.

Q. What did she ever say along that line?

A. She showed a great deal of interest and affection for her grandsons.

Q. And did she ever talk to you about them?

A. Oh, yes.

Q. And can you give us, just generally, the subject matter of those conversations? [261]

A. Well, that was the trend of it, that she was extremely interested in them and in their future.

Q. And could you tell us about how far back those conversations went?

A. Well, from 1893 on, when the children were little.

Mr. Jaureguy: You may take the witness.

Mr. Maguire: No cross-examination.

Mr. Jaureguy: That is all, Miss Murch.

(Witness excused.)

Mr. Jaureguy: We will call Miss Catlin. [262]

BLANCHE CATLIN

was thereupon produced as a witness in behalf of the defendants herein and was examined and testified as follows:

The Clerk: Please state your name.

A. Blanche Catlin.

The Clerk: Blanche Catlin?

A. Yes.

The Clerk: Spell the last name, please.

A. (Spelling) C-a-t-l-i-n.

(The witness was then duly sworn.)

Direct Examination

By Mr. Jaureguy:

Q. Miss Catlin, you live in Portland?

A. No, I live in Seaside.

Q. And did you ever live in Portland?

A. I lived in Portland most—except seven years of my life. I have lived in Seaside that time.

Q. And those seven years were when?

A. From '34 to '41.

Q. And prior to that time you lived in Portland during your entire life? A. Entire life.

Q. Now, were you in any way related to Mrs. Lucy A. H. Deady?

A. I was her niece. She was my mother's sister.

[263]

Q. And what relation are you to Miss Murch?

A. Cousin.

Q. And you were acquainted with Mrs. Deady, in addition, were you? A. - With Mrs. Deady?

(Testimony of Blanche Catlin.)

Q. Yes.

A. Yes, indeed. I lived with her for several years.

Q. And can you tell us when it was that you lived with her?

A. I lived with her at Alexandra Court from—well, it was during the war. It was either '17 or '18, I think, that I moved there, until '20 or '21. I moved away from Aunt Lucy soon after Paul died.

Q. I see.

A. Of course, she had to have a companion. And then I had lived with her before that, at the Hobart-Curtis, Virginia Hill.

Q. And can you tell us about when it was that you lived with her before that?

A. It was 1913, I am very sure,—it might have been 1912; I think it was 1913—until I moved to the Court.

Q. Did you move together, you and Mrs. Deady?

A. Yes.

Q. So you lived, then, with her from '13—

A. (Interrupting) I had been living with her before.

Q. So you lived with her from about 1913 until—

A. (Interrupting) Until we moved to the Court, which was in [264] 1917 or '18, I am not quite sure which.

Q. And at Alexandra Court did you live with her?

A. Yes.

(Testimony of Blanche Catlin.)

Q. So then was that continuous—you lived with her from about 1913 until about 1920 or '21?

A. Yes.

Q. During the time that you lived with her was Miss Murch also living with her?

A. No, she wasn't living with her at that time. She had lived with her before.

Q. Now, during any of this period of time when you were living with her did she ever discuss with you what she wished to have done with her property after her death?

A. I remember—

Mr. Maguire: (Interrupting) Pardon me—just a moment—May we interpose the same objection to this line of testimony that we did to that of the preceding witness, to any declarations or statements by Lucy A. H. Deady with regard to her property, disposition of her will or any provision?

The Court: Yes, any declaration of testamentary purpose.

A. I didn't understand that.

Mr. Jaureguy: Q. Well, you mean you didn't understand the question, or what?

A. Was there anything for me to answer?

Q. Yes. [265]

A. I didn't hear what he said.

Q. You may answer the question,—that is the result of it.

A. Oh, the question that you asked me?

Q. Yes.

(Testimony of Blanche Catlin.)

A. Yes, she did, definitely, at one time. Of course, I heard her insinuate the same thing many times, but one time definitely, after Matthew had been there, he left——

Q. (Interrupting) I wonder, before you tell us, if you could tell us when that would be?

A. This was at the Alexandra Court.

Q. If you could fix the time, about the time?

A. Oh, I don't know what time, but it was some-time between 1917 and 1920.

Q. Yes. All right, you may proceed and tell us.

A. And after Hanover had gone she said, "Well, that is where I certainly want my money to go, to those two boys", and that is the only time I ever remember of her saying definitely anything like that.

Mr. Jaureguy: Now, I wonder if I could have the first part of the answer. I think there was a little inconsistency there. I am not sure of it.

The Court: Yes; she said Hanover at one time and Matthew another.

Mr. Jaureguy: Yes, that is it. Now, was that after Hanover had been there, or after Matthew had been there? [266]

A. Matthew.

Q. Did she ever talk about this property where formerly was her home?

A. Yes, she often talked of it.

Q. Is that the property down at——

(Testimony of Blanche Catlin.)

A. (Interrupting) That is the property that she owned at the time of her death.

Q. Down at Broadway and Alder Street?

A. Yes.

Q. And what did she say about that?

A. Well, I don't know. It had been so long since she had lived there that she just talked of it as property that she expected to make her—that she expected to have to leave to her children.

Q. Well, did she say anything about where she wanted that property ultimately to go?

A. Yes; that is really the only property she had, I think.

Q. And what did she say about it?

A. That that is the property she wanted to go to her grandsons eventually.

Q. Now, was that said once or on more than one occasion?

A. That is the only time that I ever heard her say it definitely, although she insinuated it all the time.

Q. Well, I wonder if it would be possible for you to give us the statements she made that you say insinuated, or could you [267] do that?

A. Oh, I couldn't recall anything else.

Q. Now, did you know Henderson Deady?

A. What was it?

Q. Did you know Henderson Deady?

A. Yes, I did know him. We grew up together.

(Testimony of Blanche Catlin.)

Q. And during this time that you were living with your aunt where was Henderson?

A. Well, of course, Henderson wasn't living in Portland that time. He moved away from Portland when he was a very young boy.

Q. And was he living here any of that—I mean after he moved away when he was a young boy, did he ever move back to live here?

A. He never visited here while I was with Mrs. Deady, no, as far as I remember now.

Q. So that during the time you were with Mrs. Deady you don't recall ever having seen Henderson, is that——

A. (Interrupting) No, he didn't come out very often; very seldom.

Q. I am sure I——

Mr. Maguire: I move that that be stricken as unresponsive, the question of whether she saw him.

The Court: I think it is all right. You can develop that by cross-examination, if you wish.

Mr. Jaureguy: Q. Prior to 1913 had you ever lived with Mrs. Deady? [268]

A. I had never lived with her, except as she had lived at our house once for a few years, soon after Judge Deady died.

Q. Was that immediately after Judge Deady died, or was that some other time? I didn't quite get when she lived with you the first time.

A. It was after Judge Deady died. I don't know how much after. It was before 1920, I know—no, it

(Testimony of Blanche Catlin.)

wasn't, either, it was after 19—I am confused. I don't know.

Q. Yes.

A. I can't remember whether it was before my father died or not.

Mr. Jaureguy: I see. You may take the witness.

Cross-Examination

By Mr. Maguire:

Q. I understood you to say, Miss Catlin, that Dr. Henderson Brooke Deady had moved away from Portland when he was a very young man?

A. Yes, he went when he was just in his boyhood, really. He went to a preparatory school in the East.

Q. And from 1913 until 1922 did I understand you to say he never came back to Portland?

A. As I remember it, he did not, although he may have. I wouldn't be sure of it. He was—let me see—no, I don't remember his ever being out here during that period, but, as I say, I am not positive about it.

Q. Do I understand you to testify that he did not see his mother [269] any time from 1913 until the time of her death?

A. No, he was out here after I left Mrs. Deady. No, let me see—just before I went to Mrs. Deady's, I guess.

Q. Well, you went there in 1913.

A. I went there in 1913, and I think it must

(Testimony of Blanche Catlin.)

have been about 1909 or 1910 that he was out, but I can't give the dates exactly. I just remember where I was living at that time.

Q. Well, let me ask you this question: Am I correct in understanding you to say that you don't know that he ever saw his mother from 1913 until 1922?

A. Not to my knowledge, but I—no, I can't swear to that, because I may be mistaken on it.

Mr. Maguire: I see. That is all, thank you.

Mr. Jaureguy: I think that is all.

A. Is that all?

Mr. Jaureguy: Yes, that is all, thank you.

(Witness excused.)

Mr. Jaureguy: Call Mrs. Ariel Deady. [270]

ARIEL DEADY

was thereupon produced as a witness in behalf of the defendants herein and was examined and testified as follows:

The Clerk: Please state your name?

A. Ariel Deady.

The Clerk: Spell the first name.

A. (Spelling) A-r-i-e-l.

(The witness was then duly sworn.)

(Testimony of Ariel Deady.)

Direct Examination

By Mr. Jaureguy:

Q. Your name is Mrs. Ariel Deady?

A. Yes.

Q. And you live in Portland? A. Yes.

Q. And you have lived here about how long?

A. Well, I have lived here since 1900.

Q. And your husband's name is what?

A. Hanover Deady.

Q. That is one of the defendants in this case?

A. Yes.

Q. And you and Hanover have been married how long?

A. We were married in June, 1925, the first day.

Q. Now, how long had you known him before that?

A. Well, I met Hanover the first year I went to high school, [271] and I think it was in 1910, '09 or '10.

Q. And were you acquainted with his grandmother, Lucy A. H. Deady? A. Yes, I was.

Q. And when did you first become acquainted with her?

A. Well, I couldn't say exactly, but think possibly I had known him about two years the first time he took me to see her.

Q. And when was that?

A. Well, I would say that it was in '12 or '13.

Q. In '12 or '13 you first met——

(Testimony of Ariel Deady.)

A. (Interrupting) Yes. The reason I can say that, it was at that time that I went away from home to teach school, in September of 1913, and I had been to see her before that, because I corresponded with her while I was teaching school in Eastern Oregon.

Q. Were you teaching school in 1913?

A. I started teaching school in 1913, right out of high school, when I graduated from high school.

Q. Then I wish you would tell us about your acquaintance with Mrs. Deady, his grandmother, about how well you became acquainted with her.

A. Well, she was living at the Hobart-Curtis, I believe it was called, when I first met her, and Hanover took me the first time one evening to see her, and I was rather young and I was very nervous, because she seemed like a very fine old lady and [272] I was afraid I might not appear just as nice as she might think I should, but she made me feel so at home immediately and was so sweet to me that I became very much attached to her on my first acquaintance. But I don't remember of seeing her but more than once or twice before I went away to Eastern Oregon to teach school, but every year when I would come back in the summer or at Christmas time I would go to see Mrs. Deady, and often I would be invited to have a bite to eat with her on Wednesdays and Sundays, and on Christmas one time she invited Hanover and I. She loved to hear about the outside world, and she kept herself very

(Testimony of Ariel Deady.)

modern and had very modern ideas, and it was very interesting to talk to a lady of her years that kept up with everything, and I was very, very fond of her.

Q. Now, you were married the first of June, 1925. I wonder if you could tell us about how long you were engaged prior to that time?

A. Well, we talked about getting married from the time we were in high school together, but, you know how it is, you are off and on. Hanover was in the navy for a few years, and I was away teaching school a few years myself; when he was home I wouldn't be home, because I took extension work in California; so our romance was rather sketchy those two years; but after he came back from the Navy in 1919 and I came back from Eastern Oregon where I was teaching we decided fully then that we would be married. [273]

Q. Did you ever discuss that matter with Mrs. Deady?

A. Well, I didn't know that Hanover had told her that we were to be married, because I was working at the time and I wasn't ready just then to be married, nor was he, but one time when I was up there with him visiting her she asked me if—she asked Hanover to run out and buy some ice cream, and Miss Brown, who usually was there with her, was in the other part of the house, and the minute that Hanover left she called me to her, and she had a very cute little way of, when she wanted to get

(Testimony of Ariel Deady.)

you down, putting her hand on you; she said, "Ariel," she said, "Hanover tells me that you are thinking of being married, but," she said, "I am very eager that Hanover finish his law course that he started before he went in the Navy." She said, "You aren't thinking of being married right away?" and I said, "Oh, no", that my mother was alone, and my sister and I, and that we just had planned to be married. Then she said, "Well, I do hope that you will encourage him to finish his law course." She said, "It means a great deal to me. I am very fond of my two grandsons, and I was so pleased when he started to study law that I hope you will——"

Mr. Maguire: Just a minute, Mrs. Deady, please. We object to the matter of any conversations had, on the same grounds and for the same reasons as the other witnesses on the same line of testimony.

The Court: Ruling is reserved, and the same direction. [274]

Mr. Jauregui: Q. You may proceed, then.

A. So I told her, I assured her, that I wasn't thinking of being married and that I would encourage him to go to law school, that I was just as anxious as she was to have him succeed and make something of himself; and she told me then that some day—that they owned this piece of property that had been her old home and that she hoped that some day it would be more valuable than it was, and that the boys eventually would be the owners

(Testimony of Ariel Deady.)

of that property, but she said it wasn't good for boys, if they were too young, to have too much money, but she did think that as long as it might be valuable some day and that they would be the owners of it that they should know how to take care of it and she thought maybe Hanover's law course would help him. And she also spoke to me of some other matters, of my own family. Hanover had taken a book of my father's family tree up to her to assure her that I was the right kind of a person, and she spoke to me at length of the book and seemed very pleased about it. And she also told me, "You know, Ariel, if you are going to marry a young, struggling lawyer it isn't going to be very easy." She said, "I married Judge Deady and," she said, "I think a wife has a great influence on a man and on his business." She said, "I went down to Medford with him and helped him to some of the great things he did." And she also told me, "You know, a judge doesn't make much money." She said, "All that comes to him in his life is the honor that he gets from sitting [275] on the bench and the good that he does." And she told me that she didn't have anything, not very much, to leave as a monument to Judge Deady, but she did hope that the boys would never sell the property or divide it up in any way.

Q. Why not?—Pardon me—Did she say why not?

A. Well, she told me that she thought that as

(Testimony of Ariel Deady.)

long as it stood there and was in the family that it would be a monument to Judge Deady.

Q. Now, did Hanover then resume his law course?

A. Yes, he did. That was the only time that she really ever came out and spoke of the property to me, but often when I was up there she would pat Hanover and myself on the back when we were going out and saying that the early years might not be easy but that later on she thought things would be very easy for us.

Q. Now, do you remember when Mrs. Deady died? A. Yes; she died in 1923.

Q. You recall the incident? A. Yes, I do.

Q. Now, did you ever know Henderson Deady?

A. Yes, I did.

Q. And, first, I will inquire whether you recall of him coming out here before Mrs. Deady's death?

A. Yes, he was here several weeks before Mrs. Deady died.

Q. Now, after Mrs. Deady's death did you ever have any conver- [276] sation—or did you ever see Henderson Deady?

A. Oh, yes, Henderson was very friendly with us. I wasn't married to Hanover at that time, but I was working at the Johnson Piano Company, on Sixth Street, and Henderson would often drop in there and I would play some music for him and talk with him, and one time he came in and asked me to go to lunch with him, which I did. He knew Han-

(Testimony of Ariel Deady.)

over and I were to be married, but it was before we were married.

Q. And this was after Mrs. Deady's death?

A. Yes.

Q. Did you have any conversation with him at that time about the property that Mrs. Deady left?

Mr. Maguire: Object to that on the same grounds and for the same reasons; further, that statements of Henderson Brooke Deady, either before or after his mother's death, would not be competent, to prove any issue in this case, to establish, one way or the other, the testamentary intent and construction of the will or to diminish or deprecate any estate or interest which he had in the property under the will.

The Court: Received in the record, under the same conditions; ruling reserved.

Mr. Jaureguy: Q. Now you may proceed, Mrs. Deady.

A. Well, what was the question?

Q. I asked you whether he had any conversations with you with respect to the property that Mrs. Deady had left, but I will ask [277] you, also, whether he had any conversations with you with respect to the income, either or both of those subjects?

A. Well, as I remember it, this one particular day when I went——

Mr. Maguire: (Interrupting) It may be understood that our objection goes to this line of questioning, income as well as property?

(Testimony of Ariel Deady.)

The Court: Yes.

A. This one particular day when he took me to lunch we went to the Hazelwood, and he took me past the property on Broadway and Alder that is in question in this suit and he stopped and looked at it and talked about it, said that the property would be more valuable as years went on, and he talked around about different things, about the income would be more because the property would be more valuable, and he—I can't say just exactly what his words were, but he gave me to understand that Hanover and Matthew owned the property, unless he had children, and that he was married and his wife wouldn't give him a divorce and that he never expected to have children. Laughingly, he said that "possibly some day", but that he hoped that wouldn't be for a long time, and he didn't expect that it would, and he laughed and sort of joked.

Mr. Maguire: I didn't get that last. Will you read it, Mr. Reporter.

(The latter part of the foregoing answer was then read.) [278]

Q. Can you tell us about when that conversation took place?

A. Well, it was—I think this was sometime during—in fact, I know it was after his mother's death, when he was out here, before he went East. Now, I couldn't say when it was when he went East. After we were married. He was at our wedding, and

(Testimony of Ariel Deady.)

he went East after we were married, but it was before I quit working at Mr. Johnson's, and I quit working a month before we were married, so it was sometime between his mother's death—I saw him quite frequently. In fact, at one time he had a picnic supper for us up on the property that Grandmother Deady did leave to him, that belonged to the family, up on Willamette Heights, or Macleay Park, somewhere up in there.

Q. You say that was more than a month before you were married?

A. Yes, I know it was. It was while I was working at Johnson Piano Company.

Q. Can you identify the time a little more definitely?

A. No, I couldn't, but I know it was in there between those times sometime.

Q. Now, did he ever talk to you about the income that he was getting?

A. No, I don't believe he ever did.

Q. You have related this time that he took you up by the building. Was that by the building, or through the building?

A. No; he came to the Johnson Piano Company and he took me to the Hazelwood for lunch, and we walked past there and he stopped [279] and talked. The family always seemed to be proud of the fact that that was the old home. Hanover—I had heard him talk about it.

(Testimony of Ariel Deady.)

Q. Was that the only occasion, or did he ever talk to you any other time about it?

A. Well, he was at our house frequently and I often heard different things, heard them talk about the property, but I wouldn't want to say just anything definite he said, because that stood out in my mind because I thought he was taking me to lunch—he asked me lots of questions about other things, and I thought he was sizing me up, and I think he was, because I heard afterwards——

Q. (Interrupting) Well, I don't care what you heard afterwards. You may take the witness.

Mr. Maguire: No cross-examination.

(Witness excused.)

Mr. Jaureguy: Mrs. Hansen. [280]

HELEN HANSEN

was thereupon produced as a witness in behalf of the defendants herein and was examined and testified as follows:

The Clerk: State your name, please.

A. Mrs. Helen Hansen.

The Clerk: Spell the last name, please.

A. (Spelling) H-a-n-s-e-n.

(The witness was then duly sworn.)

Direct Examination.

Q. Mrs. Hansen, do you live in Portland?

A. Yes, I do.

(Testimony of Helen Hansen.)

Q. And how long have you lived here, Mrs. Hansen? A. About thirty-two years.

Q. And are you acquainted with Mr. Matthew Deady, one of the defendants? A. Yes.

Q. And have you ever been married to him?

A. Yes, I was married to him at one time.

Q. And when was that? A. In 1917.

Q. And how long did that marriage continue?

A. Until July, 1919.

Q. Now, were you acquainted with his grandmother, Mrs. Lucy A. H. Deady? A. Yes. [281]

Q. And could you give us some idea as to how well you were acquainted with her, how often you saw her?

A. Well, I met Mrs. Deady before I was married to Matthew, and then I visited with her during the time I was—at different intervals during the time I was married to him.

Q. Now, during any of these times that you visited with her did she ever discuss with you or make any statement to you as to how she desired to have her property go?

Mr. Maguire: We object to that on the same ground and for the same reasons as the other witnesses.

The Court: Received in the record, under the same conditions; ruling reserved.

A. Well, Mrs. Deady talked to me, of course, about the property and told me—of course, I was very young then, and Matthew was, and he didn't

(Testimony of Helen Hansen.)

have very much, but she always told me that some day he and his brother would own that property at Broadway and Alder. And she has taken me—she used to take me downtown, and we would always go by there and she would always talk to me about it.

Mr. Jaureguy: What would be the particular occasions that would give rise to that type of conversation?

A. Well, when I would visit her she would show me pictures of the old home that stood on that corner, that was Judge Deady's home, and tell me of their earlier life, and that she always—she seemed to like to talk about it, and when we went downtown to- [282] gether she would generally take me to eat in 'The Cat'n' Fiddle, and we would go by the place and she would say that that was going to belong to Matthew and Hanover at some time after all the rest of them was gone.

Mr. Jaureguy: You may take the witness.

Mr. Maguire: No cross-examination.

Mr. Jaureguy: That is all, Mrs. Hansen; thank you.

(Witness excused.)

Mr. Jaureguy: We will call Mr. Matthew Deady.

[283]

MATTHEW E. DEADY,

one of the defendants herein, was thereupon produced as a witness and was examined and testified as follows:

The Clerk: State your name, please.

A. Matthew E. Deady.

(The witness was then duly sworn.)

Direct Examination

By Mr. Jaureguy:

Q. Now, you are Matthew Deady? A. Yes.

Q. One of the defendants in this case?

A. Yes.

Q. And could you tell us how old you are?

A. Fifty-one.

Q. And you live in Portland? A. I do.

Q. And what is your occupation?

A. I follow engineering, rodding and chaining.

Q. Rodding and chaining?

A. Engineering work.

Q. And have you lived in Portland all your life?

A. I have; born here.

Q. And what was the extent of your education?

A. Sir?

Q. How far did you go in school? [284]

A. Went through high school—or through grammar school.

Q. Did you go to high school?

A. No, sir; I was sick, I couldn't.

Q. Now, your grandmother, Lucy A. H. Deady, do you recall her? A. I do.

(Testimony of Matthew E. Deady.)

Q. And how far back does that recollection go in your childhood?

A. Oh, quite a ways back. I was quite small.

Q. And could you just relate to us how well you became acquainted with her and how often you visited her? Just give us a little statement along that line.

A. Well, we lived out on Curtis Avenue. My father used to take us over to what they called the Hill House that they were speaking about, the Hobart-Curtis, they called it, the two names, and have us visit Grandmother, practically every other Sunday. It seemed our great ambition for Sunday to come so Father could take us over to see Grandmother.

Mr. Maguire: May I have that answer again? I missed some of it.

(The last answer was then read.)

Mr. Jaureguy: Q. When was that that you say you lived out on Curtis Avenue, that your father took you over to see your Grandmother? How old were you then?

A. Oh, about twelve or thirteen; about there.

Q. And thereafter what happened? [285]

A. Well, we continued living out there on the same address, and she moved then from the Hobart-Curtis to the Alexandra Court, and we used to go over separately, sometime I would go over by myself, naturally knowing the way over there, and visit her all I could.

(Testimony of Matthew E. Deady.)

Q. Then when were you married?

A. In '17.

Q. 1917? A. Right.

Q. And where did you live then?

A. We lived on 19th and Lovejoy.

Q. And how far was that from the Alexandra Court, where she lived?

A. Well, it was about—not very many blocks. I would say eight or nine.

Q. During the time you were married how often did you see her, if at all?

A. I practically went up there every other night.

Q. And then how long did that continue?

A. Going to see her?

Q. Yes.

A. Just as often as I could see her.

Q. No, I mean how long? Did it continue up to the time of her death, or until some other time?

A. Oh, no; right along up to—I wouldn't say right up to her death, because I was out of town when she died, but previous to [286] the time I went out of town I went to see her, at any rate, every other night, sometimes three or four nights in a row. I was right near her. I would go up to see her. At the time Paul was alive he would be there, and we both would be there at the time.

Q. Who was that last person you said would be there?

A. Paul, my uncle.

(Testimony of Matthew E. Deady.)

Q. Now, during any of this time when you were visiting with your grandmother did your grandmother ever discuss with you or make any statements to you regarding what she intended to be the disposition of her property?

A. Yes, she did.

Mr. Maguire: Just a moment. May we have the same objection to this, this line of testimony, and any declarations or conversations of the decedent, Lucy A. H. Deady?

The Court: Received in the record, under the same conditions; ruling reserved.

Mr. Jaureguy: Q. Proceed.

A. Yes, she did.

Q. Can you give us an idea about when the first time was?

A. Well, at the time I was married, and she had talked to me with regards—not to worry about the way things were going with the wife and I at the time. She meant by that that she saw that I wasn't having things that she thought I ought to have, that as my age grew older, or we grew older, that we would have [287] things that we should have, because the property was going to come to Hanover and I and we should have things the way we would like to have them.

Q. You say that was when you were married?

A. Yes, sir.

Q. Well, did she ever discuss it prior to that time?

(Testimony of Matthew E. Deady.)

A. Not that I know of.

Q. Now, did your grandmother ever buy you any presents of any kind?

A. Yes, she did.

Mr. Maguire: We move to strike that, upon the ground that that is wholly irrelevant and immaterial.

The Court: The objection is sustained. Directed.

Mr. Jaureguy: Q. Did your grandmother ever have any conversation with you in which she discussed your Uncle Paul?

Mr. Maguire: Objected to as being wholly irrelevant and immaterial.

The Court: Except insofar as it relates to the matters particularly in interest, I would think that just general declarations regarding Paul wouldn't have any relevancy.

Mr. Jaureguy: That is right.

The Court: Just a preliminary question.

Mr. Jaureguy: It really should require a Yes or No answer, and then I should go on.

The Court: Yes. [288]

A. I would like to get the question again, please.

(The question referred to was thereupon read.)

A. Well, I don't know just what you mean by that, but she discussed my uncle with me in several ways, just talking about Uncle Paul.

Mr. Jaureguy: Q. Well, I think that answers the question.

(Testimony of Matthew E. Deady.)

A. Law work, and the like of that. I don't know just—

Q. (Interrupting) Did she ever discuss with you, or did she ever tell you that she had discussed with your Uncle Paul, how this property should go?

Mr. Maguire: Objected to as wholly irrelevant and incompetent. Objected to for the same reasons.

The Court: Leave it in the record, under the same conditions.

Mr. Jaureguy: Q. The answer is no?

A. No, she didn't discuss it.

Q. Did you ever visit this building with your grandmother? A. Yes, I have.

Q. And on those occasions would she discuss the building at all with you?

A. Yes, she did.

Q. And was that just once, or was that on several occasions?

A. Several times.

Q. Could you give us some idea as to about when that was?

A. Well, one time there when she took me down to 'The Cat 'n' Fiddle and we went in there to eat, after we got through and [289] came out we stopped alongside of the building and she said, "Matthew, when this building becomes—this property—"

Mr. Maguire: (Interrupting) Pardon me. I object to any testimony of declarations of the decedent to this witness in regard to the building's disposition, upon the same ground.

Mr. Jaureguy: You have it already.

(Testimony of Matthew E. Deady.)

Mr. Maguire: Well, I want to be sure I have got it in.

The Court: I think the record is perfectly clear.

Mr. Maguire: Very well. Go ahead.

A. "When this property becomes yours and Hanover's, I don't want you in any way to get it into debt or sell it. I want you to leave this corner as it is as a monument for your grandfather. This was our home, and I always want you two boys to look after it and keep it as such."

Mr. Jaureguy: Now, you gave one instance when you went down to The Cat 'n' Fiddle.

A. Yes.

Q. Well, could you give us some idea of when that was? A. What time?

Q. Not what time of day, but what year?

A. No, I couldn't.

Q. Would you say that was before or after you were married?

A. That was after I was married.

Q. Could you say how long after?

A. Well, I should say—Well, I would say a year. I was [290] only married two.

Q. That was during the time you were married?

A. Yes, sir.

Q. And was that only one occasion that she talked about the building?

A. Oh, she seemed to be very fond to bring up the family property to us. When we were up at the

(Testimony of Matthew E. Deady.)

house and would show me the pictures of the building, and that she seemed to be very proud to think that some day Hanover and I would become owners of the property.

Q. Now, you say that for some little time prior to your grandmother's death you were out of town?

A. Yes, sir.

Q. About how long was that, would you say, before her death?

A. Before her death? Well, about—about six or seven months.

Q. Now, after her death what was the situation with respect to your residence?

A. Well, I came back to the funeral, then I went back out of town again after the funeral. I was working with the Telephone Company at that time, in Eastern Oregon. I didn't know that she was sick until I read it in the paper.

Q. Now, did you sign some stipulations that I will show you here? First, handing you Exhibits I and J—where were you when you signed those, if you can recall?

A. One of them I was in Eastern Oregon, and the other I was [291] down at Seaside.

Q. Now, did you have any conversations with anybody before you signed them?

A. I just had a letter with each one of them from my brother saying it was all right to sign them, because I—

Mr. Maguire: (Interrupting) Just a moment.

(Testimony of Matthew E. Deady.)

Mr. Jaureguy: That part, yes.

Mr. Maguire: We have an objection to the communication in the letter from his brother as incompetent.

Mr. Jaureguy: Q. What I am getting at is this, in signing those did you form an independent judgment, or did you just rely on what Hanover told you?

A. I relied on what Hanover told me. His name was on them, and the executors' and other names, and I went ahead and signed them.

Q. Now, I wish you would tell us whether that was true with respect to other things in connection with this title?

A. Absolutely. I was out of town, and when I left I told Hanover when anything came up in connection with the property I would leave it up to him and whatever he said or did was all right with me and I would follow his instructions.

Q. Now, handing you two more, K and E.

A. I don't see my name on here, and name on these—pardon—

The Court: (Interrupting) The witness says he doesn't find his name on these. [292]

A. I did, sir.

The Court: Oh.

A. I was looking at the bottom one, and it was in the second one.

Mr. Jaureguy: Q. Can you tell us about signing those two?

(Testimony of Matthew E. Deady.)

A. I signed this one out of town, I don't know just where (indicating) and this one I signed in Mr. Simon's office (indicating).

Mr. Jaureguy: The first document that the witness referred to I think it is proper to state, if you have no objections, is E. The second one you refer to is K, I think.

Mr. Maguire: Now, E was signed out of town?

A. Sir?

Mr. Jaureguy: I am talking about the compromise—no, the other one.

A. This one I signed out of town (indicating).

Q. Well, you had better give them back to me and I will take them one at a time.

A. This one I signed also (indicating).

The Court: This is Exhibit K.

A. That is the one I signed in Mr. Dolph's—or Mr. Simon's office, and this one here I signed out of town (indicating).

The Court: And Exhibit E is the one that I am now handing you.

A. I signed this one out of town. [293]

Mr. Jaureguy: Q. What is the date of that document you have now in your hand, E?

A. Twenty-eighth day of October, 1925.

Q. Were you out of town at that time?

A. Yes, I was.

Q. Well, just to refresh your memory, didn't you acknowledge that before Lester Humphreys as Notary Public?

(Testimony of Matthew E. Deady.)

A. (The witness shook his head in a negative manner.)

Q. What is that? A. I don't remember.

Q. Now, were you ever in Joseph Simon's office with your brother Hanover where you had any conversation with Henderson Deady? I am referring to after you signed the Exhibit E in October, 1925.

A. Yes, I was up there with my brother. He had asked us to come up there to Simon's office.

Q. Were anybody else there with you at the time? A. Henderson was there.

Q. Yes. A. And—

Q. (Interrupting) Just you three?

A. Just us three.

Q. Just tell what took place.

A. Henderson wanted us to sign a stipulation to get money and we wouldn't do it, and he got very angry about it; in [294] fact, what you might say, he went right up in the air about it and made such a noise that the lawyer in the next office came out and tried to quiet him down and—

Q. (Interrupting) Who was that lawyer, do you know?

A. Mr. Humphreys.

Q. Well, did he give any reason why he wanted you to sign something to give him money?

A. Yes, he said he was going back to marry this woman, that he had been out here to establish a residence to get a divorce from the other party, and he wanted us to sign a stipulation to leave her

(Testimony of Matthew E. Deady.)

a certain sum of money in case he didn't get back there alive, that he was a sick man and he was kind of leary of himself about making it back there, and he wanted to see that she was taken care of if he should happen to die before he got there; but we refused it on the grounds that we didn't know her or didn't know who she was, and never seen her.

Mr. Jaureguy: You may take the witness.

Cross-Examination

By Mr. Maguire: Q. Now, as I understand it, Mr. Deady from the time you became a young man up until the time of your grandmother's death you used to go over to see her three or four—several times a week, sometimes three or four nights in a row?

A. When I was a young man—a little fellow, once a week, when Father took us over. As I got older and knew my way over town [295] I used to go over and see her quite often, but after I was married I used to go up and see her practically every other night, when I lived within eight or nine blocks to her home.

Q. Well, when was it, you say, after your father ceased taking you boys over there on Sundays, about what age was it when you started to go over there of your own volition?

A. I don't know, sir. I wouldn't know.

Q. Approximately?

A. Well, I wouldn't know. I couldn't say.

Q. Well, can you tell us about the time that

(Testimony of Matthew E. Deady.)

your father ceased taking you boys over there on Sundays?

A. No, I couldn't.

Q. About when was it that your father passed away? A. 1913, March.

Q. 1913; and you were then, of course, in manhood, were you not?

A. In the neighborhood of about twenty-seven, yes.

Q. About how many times a week would you say that you went over to see your grandmother from the time that you were, oh, fifteen, up to the time you were married?

A. Well, I don't think that we ever missed more than two Sundays in a month, and if we didn't go over there Grandmother used to come out and see us. Father would meet her at the train and we would be there with her, because we had a train running out there in those days. There were no street cars or anything. It was the St. Johns district. You all remember that district, [296] the train—and we used to go down and meet her, and if she didn't come out, on Sunday Father always took us over there to see her.

Q. Well, were there any trains running out to St. Johns as late as 1913?

A. In '13? No, not then. I am talking about before Father died, that she used to go out—

Q. (Interrupting) Was there any train running out there as late as 1905?

(Testimony of Matthew E. Deady.)

A. Yes, there was.

Q. Steam train, or what kind of train was it?

A. Steam train. I think that was the time the steam train was running, in 1905. Quite sure. It changed to the electric at one time, but I can't remember the date, just when that was changed to electric, but I think it was 1905 that the train was still running.

Q. Well, when was it that you first commenced to go over alone to see your grandmother?

A. I don't remember.

Q. Was it as young as when you were fifteen years of age?

A. Fifteen?

Q. Fifteen.

A. Yes. Yes, sir.

Q. Well, would it be safe to say from the time you were fifteen years of age on that you went over to see your grandmother several [297] times a week?

A. Oh, yes, sir.

Q. She was then living in an apartment hotel, was she not?

A. I can't remember whether she was living at the Hill or not.

Q. Well, she was living in an apartment hotel?

A. Yes, sir.

Q. Whether it was the Hill, the Virginia-Hill or whether it was the Hobart-Curtis, or which one it was?

A. Yes.

Q. And, as I understand it, it used to be the ambition of you boys when your father was taking

(Testimony of Matthew E. Deady.)

you over there, was the Sunday visit; that was your great ambition?

A. Yes, sir.

Q. That started from the time you were about how old?

A. Well, I don't know.

Q. Haven't you any idea at all?

A. No, sir.

Q. Your memory isn't very good about that?

A. No, sir. I was too small. I remember going to see Grandmother, but how old I was I don't know. I remember Father taking us over there.

Q. Well, if you were old enough to remember that these weekly visits were your childhood ambition, couldn't you give us some idea how old you were at that time when you formed that ambition?

A. Oh—no, I couldn't. [298]

Q. You remember the ambition, but not your age?

A. Yes, sir.

Q. Now, when was it that your grandmother first commenced to state to you about her hopes that some day you and Hanover would be the owners of the property at First and Alder—I mean Broadway and Alder, not First and Alder; Broadway and Alder?

A. How old was I?

Q. Yes. A. I don't remember.

Q. Well, had you been married at that time?

A. The first time she spoke to me, I wasn't married.

(Testimony of Matthew E. Deady.)

Q. How many years before you were married?

A. Oh, I should say several years before.

Q. About what do you mean by "several"?

A. Well, I would put it five or six years before.

Q. Five or six years? A. Yes, sir.

Q. When were you married? A. In 1917.

Q. When did your Uncle Paul die?

A. In 1923.

Q. I beg your pardon?

A. 1923, Paul died, March of 1923.

Q. Did he die prior to the time you and your first wife were divorced, or after? [299]

A. He died—let me see—I was divorced when he died?

Q. When were you divorced? A. 1919.

Q. In 1919? A. Right.

Q. So then he didn't live until 1923, did he?

A. He did. He died in 1923—I don't remember now. 1923 was when he died.

Q. Well, while your Uncle Paul was alive did your grandmother ever make any statement that she wanted you and Hanover to have the property?

A. Yes, she made the statement, one time when I was up there, that the property was—would be ours, that is, Hanover and I, when we were older and when the others had passed away, that she wanted us to be sure and look after it and take care of it.

Mr. Maguire: That is all, thank you.

Mr. Jaureguy: That is all.

(Witness excused.)

The Court: Take a recess, gentlemen.

(A short recess was thereupon had, after which proceedings were resumed as follows:)

Mr. Jaureguy: The defendants now offer in evidence Defendants' Pre-Trial Exhibit F, which is the order of the Circuit Court of Multnomah County, Probate Department, fixing the inheritance taxes in the Estate of Lucy A. H. Deady, deceased.

[300]

Mr. Maguire: May I inquire of counsel what it is claimed the relevancy of this is?

Mr. Jaureguy: Yes, surely. The will of Mrs. Deady provided that the inheritance taxes would be paid out of income from the estate, that is, were not to be paid by the beneficiaries, but by the estate and out of the income, and would be paid prior to the division of income among her beneficiaries. Then that connects up with the arguments and the evidence and the statements and the exhortations of Henderson Deady that he wanted to get an advance and he wanted to get his income right away rather than wait; that, together with the sinking fund—the sinking fund was taken care of in the pre-trial order. There is something in the pre-trial order giving the amount of inheritance tax, accepting the amount as fixed in the order.

Mr. Maguire: Well, what the inheritance tax was and when it was ordered paid, it seems to me that would be wholly irrelevant and immaterial and neither adds nothing nor takes nothing away from the rights of Henderson Brooke Deady nor

takes nothing away from the plaintiff, and we object to it on those grounds.

The Court: Received subject to the objection and subject to the former ruling.

(Certified photostatic copy of Order of Multnomah County Probate Court of April 21, 1924, determining state inheritance tax in Lucy A. H. [301] Deady Estate, so offered and received, having previously been marked as Defendants' Pre-Trial Exhibit F, was thereupon marked received subject to the objection, ruling reserved.)

DEFENDANT'S PRE-TRIAL EXHIBIT F

In the Circuit Court of the State of Oregon
For the County of Multnomah
Probate Department.

No. 22735.

In the Matter of the Estate of
LUCY A. H. DEADY,
Deceased.

Now on this day come Henderson Brooke Deady and Joseph Simon, Executors of the Last Will and Testament of Lucy A. H. Deady, deceased, and present their petition duly verified and filed herein, praying for an order fixing and determining the amount of inheritance tax upon the property passing by the death of the deceased, due the State of Oregon, and directing payment therefor.

And it further appearing to the Court from the inventory and appraisal filed herein, that the gross value of said estate is the sum of.....\$276,347.02

That the claims against said estate presented and allowed amount to..... 42,623.55
and the costs and expenses of administration and of executing the will of deceased, amount to..... 9,271.22
leaving a net estate upon which said inheritance is to be calculated, amounting to.....\$224,452.25

\$10,000 Exempt
15,000 at 1%.....\$ 150.00
25,000 at 1½%..... 375.00
50,000 at 2%..... 1,000.00
\$124,452.25 at 3%..... 3,733.57
Collateral Tax 2,247.92

Total Tax\$7,506.49

Marye Thompson Deady, no relation,
57 years, Portland, Oregon,
Bequest of \$75.00 per month for
life or until beneficiary marries, Value of Bequest, \$9,323.38

Tax \$500.00 at 2%..... \$10.00
500.00 at 4%..... 20.00
1,000.00 at 6%..... 60.00
2,000.00 at 8%..... 160.00
5,323.28 at 10%..... 532.33

\$782.33

Mary E. Deady, no relation,
65 years, Portland, Oregon,
Bequest of \$150.00 per month
for life, Value of Bequest, \$14,103.94

Tax \$ 500.00 at 2%..... \$10.00
500.00 at 4%..... 20.00
1,000.00 at 6%..... 60.00
2,000.00 at 8%..... 160.00
6,000.00 at 10%..... 600.00
4,103.94 at 15%..... 615.59

\$1,465.59

Total Inheritance Tax due the State of Oregon.....\$7,506.49

It is Therefore Ordered and Adjudged that the amount of such inheritance tax be and the same hereby is fixed at the sum of \$7506.49; that said sum, less the amount of rebate which may be allowed for prompt payment be forthwith paid by said Executor to the Treasurer of the State of Oregon, and be charged to the beneficiaries under the Will of Deceased, as herein estimated.

Dated April 21, 1924.

[Illegible]

Judge.

127/67

No. 87012

State of Oregon,

County of Multnomah—ss.

I, A. A. Bailey, County Clerk, Ex-Officio Recorder of Conveyances and Ex-Officio Clerk of the Circuit Court of the State of Oregon, for the County of Multnomah, which Court has exclusive jurisdiction of all probate proceedings in said County, do hereby certify that the foregoing copy of Order in the Matter of the Estate of Lucy A. H. Deady, Deceased, has been compared by me with the original, and that it is a correct transcript therefrom, and of the whole of such original Order as the same appears of record in my office and in my custody.

In Testimony Whereof, I have hereunto set my

hand and affixed the seal of said Court, this 13th day of July, A. D. 1940.

(Seal)

A. A. BAILEY,

County Clerk.

By E. L. FERGUSON,

Deputy.

[Endorsed]: Filed Feb. 21, 1942.

Mr. Jaureguy: Defendants now offer in evidence Defendants' Pre-Trial Exhibit L, which is a stipulation between the Executor and Trustee of the Estate of Lucy A. H. Deady and the State Treasurer for the settlement of the inheritance tax which became due after the death of Henderson Brooke Deady by reason of the exercise of appointment given in the will of Lucy A. H. Deady. I will say that that will be followed up by the petition, the order, and some correspondence from The First National Bank and from Robert F. Maguire.

Mr. Maguire: Well, with regard to this particular exhibit, inasmuch as it purports to be a stipulation entered into in September, 1935, after the death of Charlotte Howell Deady, we object to this stipulation or any of the recitals therein or the facts as contained, that it could bind neither Charlotte Howell Deady nor Richard Howell, the plaintiff, as wholly irrelevant and immaterial.

The Court: Let me see it.

Mr. Jaureguy: I might add that it can properly be considered, I think, only in connection with the further exhibits that I have referred to and which will presently be offered. [302]

The Court: I don't see the relevancy of this, offhand.

Mr. Jaureguy: I would like to suggest, if your Honor please, if your Honor has no objection, that you wait and reserve ruling at least until I offer these others, and then I think it will connect it up.

The Court: Put it in the record, and ruling reserved.

(Photostatic copy of Stipulation for Settlement of Inheritance Tax in Lucy A. H. Deady Estate, dated September — 1935, so offered and received, having previously been marked as Defendants' Pre-Trial Exhibit L, was there-upon marked received subject to objection, ruling reserved.)

DEFENDANT'S PRE-TRIAL EXHIBIT L

In the Circuit Court of the State of Oregon
For the County of Multnomah
Department of Probate

No. 22735

In the Matter of the Estate of

LUCY A. H. DEADY,

Deceased.

STIPULATION FOR SETTLEMENT OF INHERITANCE TAX

Comes now Rufus C. Holman, State Treasurer of the State of Oregon, and The First National Bank of Portland, Oregon, executor of the estate of Lucy A. H. Deady, and trustee under said decedent's will, and stipulate as follows for the settlement of

additional inheritance tax to the State of Oregon therein, that

Whereas, under the eighth clause of the will of said decedent, Henderson Brooke Deady is given the power to appoint by his last will and testament, to his wife, if he had a wife living at the time of his death, two-thirds of the net income of lot one block 212, City of Portland, to be held and enjoyed by his wife for the term of her natural life, and

Whereas, the said Henderson Brooke Deady, died on or about the 28th day of May, 1933, leaving a last will and testament duly executed wherein and whereby he exercised said power of appointment by appointing the said two-thirds income from said real property to his wife, Charlotte Deady, for the period of her natural life, and

Whereas, at the death of Henderson Brooke Deady, additional inheritance tax accrued to the State of Oregon in the estate of Lucy A. H. Deady, by reason of the exercise of said power of appointment, and

Whereas, said Charlotte Deady died on the eighth day of August having enjoyed the said income for a period of approximately two years and three months, and

Whereas, a controversy exists between the said executor and State Treasurer as to the proper method of arriving at the value of the bequest of said income to said Charlotte Deady and as to the valuation which should be placed upon such legacy for the purposes of inheritance tax of the State of Oregon, and

Whereas, said legacy is of such a nature that the liability for inheritance tax and the valuation thereof is doubtful and cannot with reasonable certainty be ascertained under the provisions of law and the parties hereto have agreed to a final compromise and settlement of all liability of said estate for inheritance tax upon said legacy in consideration of payment to the State of Oregon of twenty-five hundred dollars (\$2500.00).

Now Therefore, for the best interest of said estate and the state of Oregon, the parties hereto agree:

(1) That the said executor shall forthwith pay to the State Treasurer the sum of twenty-five hundred dollars (2500.00) which sum shall be received by the State Treasurer in full and final settlement of all liability of said estate upon inheritance tax of Charlotte Deady and official receipt of the State Treasurer issued therefor;

(2) that the court may make an order fixing and determining inheritance on said legacy in accordance herewith.

In Witness Whereof, the parties hereto have set their hands this day of September, 1935.

RUFUS C. HOLMAN

State Treasurer

THE FIRST NATIONAL BANK
OF PORTLAND

By M. A. TAYLOR

Executor and Trustee of the
estate of Lucy A. H. Deady,
deceased

The foregoing stipulation is hereby approved for the reasons therein set forth.

W. VAN WINKLE

Attorney General of Oregon

Approved: [Illegible]

Circuit Judge

[Endorsed]: Filed Oct 1 1935 A. A. Bailey, Clerk
L. H. Emerson, Deputy

[Endorsed]: Filed Feb. 21, 1942.

Mr. Jaureguy: I am offering these in the order in which they were marked at pre-trial, which is not in chronological order. Defendants' Pre-Trial Exhibit M, which is Petition For Determining Contingent Inheritance Tax, being a document for a similar purpose as that of the last exhibit.

Mr. Maguire: We object to this upon the same grounds and for the same reasons.

The Court: Received in the record under the same conditions.

(Photostatic copy of Petition For Determining Contingent Inheritance Tax, In the Matter of the Estate of Lucy A. H. Deady, Deceased, so offered and received, having previously been [303] marked as Defendants' Pre-Trial Exhibit M, was thereupon marked received subject to objection, ruling reserved.)

DEFENDANT'S PRE-TRIAL EXHIBIT M

In the Circuit Court of the State of Oregon
for the County of Multnomah
Department of Probate.

No. 22735

In the Matter of the Estate of LUCY A. H.
DEADY, Deceased.

PETITION

For Determining Contingent Inheritance Tax.

Comes now The First National Bank of Portland (Oregon), Executor of the Estate of Lucy A. H. Deady, deceased, and respectfully shows to the Court:

That on or about the 25th day of November, 1924, this Court made and entered an order in the matter of the Estate of Lucy A. H. Deady, deceased, wherein the Court found and determined as far as was then ascertainable the value of the respective distributive shares of said estate under the Will of said decedent, together with the amount of inheritance tax then due to the State of Oregon upon said legacies, which tax was thereafter duly paid to the State of Oregon and receipt issued therefor. At the time said Order of Tax Determination was made there existed a possibility of additional inheritance tax accruing to the State of Oregon by reason of the provisions of decedent's Will hereinafter mentioned, which contingent tax has never been determined heretofore.

By Virtue of Paragraph Eighth of the Will of

said decedent a power was vested in Henderson Brooke Deady to appoint by Will two-thirds of the net income of Lot 1 Block 212, City of Portland, unto his wife for her life, if he should have a wife living at the time of his death.

Said Henderson Brooke Deady died on the 28th day of May, 1933, leaving a Last Will and Testament duly executed, wherein he exercised said power of appointment by bequeathing the said two-thirds income from said real property to his wife, Charlotte Deady, for the period of her natural life. By reason of the exercise of said power additional inheritance tax accrued to the State of Oregon upon the life estate thus passing to Charlotte Deady.

That pending the adjustment of said inheritance tax said Charlotte Deady died in August, 1935, having enjoyed the income from said property for a period of only two years and three months. The death of Charlotte Deady has rendered it uncertain what basis should be adopted for valuation of the interest which she received in the income of said property, and consequently, the amount of inheritance tax which should be assessed thereon. A controversy having arisen between the State Treasurer and the First National Bank, as Executor of said Estate, as to the valuation of said inheritance and the amount of tax, said Executor and the State Treasurer have, with the approval of the Attorney General and this Court, entered into a Stipulation for the compromise and final settlement of the said tax upon the payment to the State of Oregon of the sum of \$2500.00, which Stipulation is on file herein.

Wherefore, Petitioner prays that an Order of this Court be made based upon said Stipulation, fixing and determining the amount of inheritance tax to be paid, the State of Oregon upon the distributive share of Charlotte Deady in the sum agreed upon, to-wit: \$2500.00.

THE FIRST NATIONAL BANK OF
PORTLAND (Oregon),
Executor,

By M. A. TAYLOR,
Assistant Trust Officer.

SIMON, GEARIN, HUMPH-
REYS & FREED,
Attorneys for Petitioner.

State of Oregon,
County of Multnomah—ss.

I, M. A. Taylor, being first duly sworn, say that I am Assistant Trust Officer of The First National Bank of Portland (Oregon), Petitioner above named, and that the statements contained in the foregoing Petition are true, as I verily believe.

M. A. TAYLOR.

Subscribed and sworn to before me this 1st day of October, 1935.

(Seal) R. A. WELCH,
Notary Public for Oregon.

My commission expires Sept. 5, 1936.

[Endorsed]: Filed Oct. 1, 1935. A. A. Bailey,
Clerk; L. H. Emerson, Deputy.

[Endorsed]: Filed Feb. 21, 1942.

Mr. Jaureguy: And Defendants' Pre-Trial Exhibit N, which is the order fixing inheritance tax, dated October 1st, 1935.

Mr. Maguire: Object to that on the same grounds and for the same reasons.

The Court: Same ruling.

(Photostatic copy of Order Fixing Inheritance Tax, In the Matter of the Estate of Lucy A. H. Deady, Deceased, so offered and received, having previously been marked as Defendants' Pre-Trial Exhibit N, was thereupon marked received subject to objection, ruling reserved.)

DEFENDANT'S PRE-TRIAL EXHIBIT N

In the Circuit Court of the State of Oregon for the
County of Multnomah, Probate Department.

No. 22735

In the Matter of the Estate of
LUCY A. H. DEADY, Deceased.

ORDER

Fixing Inheritance Tax

This day came The First National Bank of Portland (Oregon), Executor of the Estate of Lucy A. H. Deady, deceased, and petitioned the Court for an Order determining the amount of inheritance tax to be paid the State of Oregon on the distributive share of Charlotte Deady under the Will of Lucy A. H. Deady, deceased;

And it appearing to the Court that The First National Bank of Portland, (Oregon), as Executor and Trustee of said Estate, and Rufus C. Holman, State Treasurer of the State of Oregon, have with the approval of this Court and the Attorney General duly made and filed their written Stipulation for compromise and settlement of said inheritance tax, and that an Order determining said tax should be entered in accordance with said Stipulation;

Now, Therefore, It Is Hereby Ordered and Decreed that said Stipulation for compromise of said tax be and the same hereby is approved; that inheritance tax due to the State of Oregon in the Estate of Lucy A. H. Deady, deceased, upon the distributive share received by Charlotte Deady from said estate be and the same hereby is fixed and determined in the sum of \$2500.00. That said Executor forthwith pay said tax to the State of Oregon, which payment shall be in full and final settlement of any and all inheritance taxes due to the State of Oregon in the matter of said Estate.

Dated this 1st day of October, 1935.

[Illegible]

Circuit Judge.

[Endorsed]: Filed Feb. 21, 1942.

Mr. Jaureguy: And letter from Rufus C. Holman, State Treasurer, to the First National Bank of Portland, dated May 16, 1935, with reference to tax which became payable from the Lucy A. H. Deady Estate after the death of Henderson Deady.

Mr. Maguire: We object to this upon the same grounds and for the same reasons.

The Court: Received in the record under the same conditions.

(Typewritten copy of letter, bearing date May 16, 1935, Rufus C. Holman, State Treasurer, by E. G. Sanders, Inheritance Tax Auditor, to First National Bank of Portland, so offered and received, having previously been marked as Defendants' Pre-Trial Exhibit O, was thereupon marked received subject to objection, ruling reserved.)

DEFENDANT'S PRE-TRIAL EXHIBIT O

State of Oregon
Treasury Department
Salem

Portland, Oregon
May 16, 1935

First National Bank of Portland
Sixth & Stark Streets
Portland, Oregon

Gentlemen:

We have recently examined the probate record in the estate of Lucy A. H. Deady, decease, who died

August 29, 1923, and observe that you have qualified as executor and trustee of her estate as successor to Joseph Simon, now deceased.

We further observe that Henderson Deady, a son of Lucy A. H. Deady and a legatee under her will, died May 28, 1933, and by his last will and testament exercised a power conferred by the will of Lucy A. H. Deady whereby his widow, Charlotte Deady, became entitled for her life to two-thirds of the income from the mother's estate. Two-thirds of the income appears to be at least \$600 per month, with some prospect of her receiving any excess income over and above mortgage retirement requirements.

By virtue of Henderson Deady's election for the benefit of his widow a substantial additional inheritance tax accrued to the State of Oregon at his death upon the present worth of the life estate of Charlotte Deady thus created. This tax accrued from the estate of Lucy A. H. Deady as donor of the power.

We understand that Charlotte Deady was sixty years of age at the time of her husband's death. Assuming \$600 per month, or \$7,200 per year, as her income, the present value thereof for her life, as found by the statutory of mortality tables, is \$67,786.00, with a resulting inheritance tax thereon at the rates prescribed in the third classification of Section 10-603, Oregon Code 1930, of \$12,546.50. Interest is accruing on the tax at the rate of eight

per cent from eight months after the death of Henderson Deady, or January 28, 1934.

The record also indicates that Carlotte Deady's share of the income has been paid to her by your predecessor without any retention therefrom to provide for her inheritance tax. Consequently if some definite arrangement is not made by you within one week from date of this letter to protect the state's interests, we shall be compelled to take action ourselves on behalf of the State.

Very truly yours,

RUFUS C. HOLMAN,

State Treasurer

By E. G. SANDERS,

Inheritance Tax Auditor

EGS:HR

[Endorsed]: Filed Feb. 21, 1942.

Mr. Jaureguy: And we offer now Pre-Trial Exhibit P, which is a letter from Maguire, Shields & Morrison, by Robert F. Maguire, to the First National Bank, discussing the letter from the State Treasurer to the First National Bank and giving his opinion on the matter of the inheritance taxes.

Mr. Maguire: Objected to upon the same grounds and for the same reasons.

The Court: Received in the record under the same conditions

(Typewritten copy of letter, bearing date May 23, 1935, Maguire, Shields & Morrison, by Robert F. Maguire, to First National Bank, Portland, Oregon, so offered and received, having previously been marked as Defendants' Pre-Trial Exhibit P, was thereupon marked received subject to objection, ruling reserved.)

DEFENDANT'S PRE-TRIAL EXHIBIT P

Frederick Steiwer
Counsel

Law Offices of
Maguire, Shields & Morrison
Attorneys at Law
1113 Public Service Building
Portland, Oregon

Robert F. Maguire
Roy F. Shields
William H. Morrison

Leland B. Shaw
Delmas R. Richmond

May 23rd, 1935

First National Bank,
Portland, Oregon.

Gentlemen:

Mr. Robert Strong, executor of the estate of Henderson Brooke Deady, has referred to us a copy of the letter of the State Treasurer dated May 16, 1935, relative to the inheritance tax alleged due the

State of Oregon by reason of the exercise of the power of appointment given him under the will of Lucy A. H. Deady, deceased, to will a portion of the income and real property in favor of his surviving widow.

We are of the opinion that the tax in question is not properly assessed and would be glad to discuss the matter with you.

In our judgment the utmost that the state can claim would be the inheritance from the wife to her husband, which would be less than one-twelfth of the amount of the claim.

Yours very truly,

MAGUIRE, SHIELDS &
MORRISON

By /s/ ROBERT F. MAGUIRE.

[Endorsed]: Filed Feb. 21, 1942.

Mr. Jaureguy: Those are the letters which I stated would connect up with Exhibit L and which should be considered together, some of them after the death of Charlotte Deady and some prior to the death of Charlotte Deady. [305]

Then we offer in evidence Pre-Trial Exhibit Q, Defendants' Pre-Trial Exhibit Q, which is a letter, dated October 25, 1923, from Wilbur, Beckett & Howell, by R. W. Wilbur, addressed to Mr. Joseph Simon, regarding the contentions—or the position, rather, of Mr. Wilbur as attorney for the two individual defendants in this case.

Mr. Maguire: We object to this on the ground that it is wholly irrelevant and immaterial, it is incompetent to prove any fact in issue, is not binding upon Henderson Brooke Deady, Charlotte Howell Deady, or the plaintiff.

Mr. Jaureguy: Your Honor will recall the conversations between Henderson Brooke Deady and Hanover Deady in which Henderson Brooke Deady was urging that he be given an immediate income as large as possible and that the sinking fund be deferred, and also that he stated to them that Mr. Simon had said to him that if he could get their consent it was all right with him. Now, this is the letter that was sent prior to those conversations, or at least prior to most of them, in which the position was taken and the estate was advised through one of its executors what their position at that time was, so as to show the position that had been taken on their behalf, which Henderson was attempting to overcome. That is the purpose of this letter.

Mr. Maguire: There being no showing that that letter was ever shown to, or read to, or the contents communicated to, [306] Henderson Brooke Deady, it being merely addressed to a stranger, it has no relevancy or competency whatsoever in this case.

Mr. Jaureguy: This was addressed to an executor of the estate, the very man, along with Henderson Deady, who was required to make the decision as to whether Henderson was going to get any money at all or not for a certain time, and, if so,

how much, and the man, I can say, that has probably more than fifty per cent of the right to say, because he was the one standing in a neutral position, whereas Henderson was in the position of the person to be benefited, whereas Simon was the last one to be convinced; this was given to him as executor. Now, in addition to all that, the statement that Henderson said that Simon had told him that if he could get the consent of the boys it was all right with him.

Mr. Maguire: It indicates, your Honor, the extreme danger of listening to any hearsay testimony. If a witness is to be permitted to state that someone not a party to the litigation told him something, and then we attempt to prove that that person told him something by proving a communication from another person to the first person, neither of whom are litigants, and with no foundation laid to show that either the plaintiff or any of the plaintiff's predecessors in interest had the slightest knowledge of the communication, why, we just simply throw proof at large and we are deciding cases entirely [307] upon hearsay ex-parte statements.

The Court: Well, I will receive it under the same conditions.

(Letter, bearing date October 25, 1923, Wilbur, Beckett & Howell, by R. W. Wilbur, to Mr. Joseph Simon, so offered and received, having previously been marked as Defendants' Pre-Trial Exhibit Q, was thereupon marked received subject to objection, ruling reserved.)

DEFENDANT'S PRE-TRIAL EXHIBIT Q

R. W. Wilbur

H. B. Beckett

F. C. Howell

E. K. Oppenheimer

Wilbur, Beckett & Howell

Attorneys at Law

Board of Trade Building

Portland, Oregon

Mr. Joseph Simon,

Attorney at Law,

Mohawk Building,

Portland, Oregon.

My Dear Mr. Simon:

In re Deady Estate.

We represent the interests of Mary E. Deady, Matthew Edward Deady and Hanover Deady and I am addressing you in the interests of my clients.

A few days ago rumor came to me that Mr. Henderson Deady was going to endeavor to borrow or get an advance of some kind from the estate and my clients desire to protest against such a procedure and I do not believe that he is entitled to such an advance either under the will or legally and from my conversation with you over the phone a few days ago, I understand that you concur in this opinion.

Rumor has also come to me that Mr. Henderson Deady wants to break the Ungar lease on the property at Broadway and Alder Streets on the theory that Ungar has no right to sublet the property. In my opinion, it would be inadvisable to precipitate any litigation of this kind unless there was a positive provision in the lease to Mr. Ungar that he should not sublet. It is possible that there is a provision in the lease that Ungar was not to sublet without the consent of Mrs. Deady but it is quite possible that Mrs. Deady's consent may have been obtained to the subleasing.

I have further been informed that Mr. Henderson Deady would like to get hold of some money from the estate, probably to pay his regular living expenses and if money can be paid consistent with the provisions of the will and preserving enough of the assets to take care of all of the obligations, I am inclined to think that my clients would be in favor of this purely as a matter of family good feeling.

Under Section 5 of the will, there was left \$150.00 per month to Mary E. Deady and \$75.00 per month to the widow of Paul Deady and these appear to be specific bequests.

In Paragraph "a", being the next paragraph of the will, there is given to Matthew Deady and Hanover Deady \$100.00 per month each, and the remainder of the income shall be paid to Henderson Brooke Deady. I take it that the \$100.00 to be paid to the two grandchildren is also a specific bequest

and that the bequest to them and the bequest to Mary E. Deady and the widow of Paul Deady, are cumulative and really begin to run from the time of the death of Lucy Deady.

There is a provision that the remainder of the income shall be paid to Henderson Deady but that there shall be no such distribution until the inheritance taxes and legacies have been paid and the sinking fund provided for for the purpose of paying off the mortgage upon the property.

Roughly figuring the income of this estate, it is possible that Henderson Deady might get an income of approximately \$600.00 a month but I assume that no such sum could be paid to him in view of the fact that the amount of the inheritance taxes and the amount required to provide for the sinking fund cannot be ascertained accurately and in talking over this matter with my clients, believe that it would be satisfactory to them, if it is consistent with your views and with the law, to have paid from the income each month as follows:

Mary E. Deady	\$150.00 per month
Marye Thompson Deady	\$ 75.00 per month
Matthew Edward Deady	\$100.00 per month
Hanover Deady	\$100.00 per month

That there be paid to Henderson Brooke Deady perhaps \$150.00 or \$200.00 per month, the same to apply on any sums that might be due to him out of the remainder of the income after the payment of the inheritance taxes and providing for the sink-

ing fund, as it would apparently be absolutely safe for Henderson Deady to get \$150.00 or \$200.00 a month.

It is naturally for the interests of my clients and particularly the two grandsons to have as large a sinking fund created as possible so as to pay off the mortgage, as under present family conditions, as I understand them, under Paragraph 7, the two grandsons will probably eventually own this whole property.

Relative to the payments that I have spoken of above, it seems to me that the executors would be fully protected if all of the interested parties should enter into a stipulation for a payment of these bequests or monthly allowances at the present time on the basis above mentioned and that the court would probably order payments in view of the fact that all parties would agree to these payments, but, of course, the payments to Henderson Deady will have to be small enough so as to allow an ample amount to pay the expenses of administration, income taxes and provide for the sinking fund.

Therefore, I desire to say that in my opinion, all of the bequests herein spoken of are specific bequests and should be paid as soon as the executors can determine that they can safely be paid with the exception that Henderson Deady is to get nothing until all of these bequests have been paid and also money provided for the purposes herein above mentioned, and in my opinion, the estate can probably

allow Henderson Deady on account the matter of \$200.00, or something of that kind, per month.

I will be glad to hear from you about these matters to know if some plan outlined as above meets with your approval and it seems to me that it is the only plan that can possibly be devised for Henderson Deady to get any money out of the property until the estate is settled.

Yours very truly,

WILBUR, BECKETT &

HOWELL

By R. W. WILBUR.

RWW/P

[Endorsed]: Filed Feb. 21, 1942.

Mr. Jaureguy: Then we offer in evidence Defendants' Pre-trial Exhibit R, which is a carbon copy of a letter, dated October 26, 1923, addressed to Messrs. Wilbur, Beckett & Howell, and, while it does not have any signature, I think that it is probably admitted in the pre-trial order that it was written by Joseph Simon.

Mr. Grant: We admit the authenticity.

Mr. Jaureguy: In answer to the letter which is Defendants' Pre-Trial Exhibit Q, and stating Mr. Simon's position on the matter.

Mr. Maguire: We make the same objection, on the same grounds and for the same reasons.

Mr. Jaureguy: This, I may say, perhaps has an additional ground of admissibility, and that is a

subject matter thereof with Dr. Deady and Chester V. Dolph.

Enclosure.

Very truly yours

JS/K.

[Endorsed]: Filed Feb. 21, 1942.

Mr. Jaureguy: Then there has been received, subject to objection, Defendants' Pre-Trial Exhibit G, which is a copy of an unexecuted agreement, and after that was received subject to the objection there was some discussion about it and we stated that we would obtain the original. We do not have it here now, but we think we can have it the first thing in the morning.

The Court: I think that will be perfectly all right, to bring it in the morning.

Mr. Jaureguy: And, as presently advised, why, that is all the evidence we have to introduce. If we could rest with that reservation, why,—

The Court: (Interrupting) Yes. [310]

Mr. Maguire: May it please your Honor, so that we may come to as intelligent a conclusion upon this matter that has now arisen as possible, we now request the Court to rule on our objection and our motion to strike the testimony of Hanover Deady with regard to the Exhibit G and with regard to the position which he had taken to the right of Charlotte Howell Deady to receive the income during her life and the testimony that he had not heard

that she had made no claim of a fee simple estate prior to the time that he declined to execute Exhibit G, and that if he had known of it he would have executed Exhibit G. We appreciate the difficulty that the Court may be in, in view of the way that by common consent we have proceeded in the taking of testimony, and were this the matter of any other witness I would not suggest to the Court the necessity or even advisability of making a ruling at this time, but since the Court is aware of the situation I don't see that in justice [366] to the interests of our client we can do other at this time than make this motion.

The Court: Court will be at recess.

(A short recess was thereupon had, after which proceedings were resumed as follows:)

The Court: I am sorry that the question has arisen in just the way that it has, but I am forced to the conclusion that I must announce to you what my determination of the facts of this case is. On the plaintiff's case as it now stands there are questions, it is true, of the admissibility or inadmissibility of evidence in this case, technical questions, on which I will give you a ruling so that you can make up your record. A great many of the matters are, in my opinion, inadmissible, but taking the case as a whole I see nothing in the testimony which tends to make me vary the conclusion that I arrived at in reading the will itself. I have given a very careful study of the will, extending over months,

and I have arrived at the conclusion that the main point in Mrs. Deady's consideration at the time that she drew the will was that she desired to keep this property intact for an indefinite period of time, and that conclusion is borne out by the testimony in this case. That alone would not necessarily invalidate the executory devise, except for the fact that in her own thinking and in the terms of the will, which I believe reflected her thinking, she made the executory devise depend upon the period of [367] distribution. Now, one cannot tell from the terms of the will when the period of distribution was to be. I have taken meticulous care to try to discover when this so-called trust would end. I have been unable to discover from the terms of the will, I think no one else has been able to discover, when it would end. The estate in this case has been held open, the trusteeship has been continued as an operation, even today. Now, as the Court formerly determined, making the executory devise depend upon that indefinite period of distribution rendered it invalid, and, incidentally, followed the rule against perpetuity. The result of that was, viewing the whole situation, the only way that the Court could uphold the will at all, under the decisions of the Supreme Court of Oregon, was to treat the gift to Henderson Brooke Deady as a fee upon the death of the testator. She was at that time living. It is unfortunate, even in my own thinking, the main desire of the testatrix to hold this property, to give the benefit to her family in perpetuity, can-

not be carried out, but I think it was a natural desire, which was frustrated by the rules of law, and I see nothing in this record, whether the evidence be admissible or inadmissible, which tends to make me believe that the testatrix did not intend, under the circumstances, to give the fee to Henderson Brooke Deady. I think her intention was a little vague on that point, and I think it has been reflected in the testimony here as to [368] just how that worked out, but I find nothing in the testimony any place which indicates that she thought the executory devise would take effect at any time except at the point of distribution, wherever that may be.

The dealings between Hanover Deady and Charlotte Howell Deady indicate, in my mind, that they were looking at the matter from two different points of view. In the offered document there it seems that Charlotte Howell Deady was asking for a life estate in two-thirds of the property. Unless she was claiming more interest than simply the distribution of the income from two-thirds, I do not think that the document would have been written in that way.

There is another point that I will take into consideration for a moment, and that is the promise upon the part of Henderson Brooke Deady that he would have no children in the future. If that promise was made to anybody I do not think anyone could have relied upon it. A man could not say that he could not have children in the future.

I do not think that he could guarantee that. I do not think that anyone would have a right to believe that he could guarantee it, either his mother or other heirs of the estate. It is perfectly certain that if he had heirs they took the fee, if he had issue they took the fee. And so that is going to be the outline of my decision, gentlemen, and you can make up this record any way that you wish and I will rule upon the technical questions [369] and give you a memorandum upon it, and I think perhaps I should embody these conclusions in a definitive memorandum before I discuss the testimony.

Mr. Grant: In view of that, your Honor—in the first place we consent to the substitution of the original, reserving the same objections to the original that we made to the originally offered copy, Exhibit G.

(The original unexecuted agreement between Charlotte Howell Deady, Hanover Deady, et al, dated October 22, 1934, so produced, offered and received, was thereupon substituted for typewritten copy previously marked as Defendants' Pre-Trial Exhibit G, similarly marked, and was received subject to objection, ruling reserved.)

DEFENDANT'S PRE-TRIAL EXHIBIT G

This Indenture made this 11th day of October, 1934, between Charlotte Howell Deady, widow of Henderson Brooke Deady, deceased, of New Milford, County of Litchfield, State of Connecticut,

party of the first part, and Hanover Deady and Ariel Deady, his wife, and Matthew Edward Deady and Margaret Deady, his wife, all of the City of Portland, Multnomah County, State of Oregon, parties of the second part.

Witnesseth:

That Whereas Lucy A. H. Deady of Portland, Oregon, now deceased, in her lifetime was the owner in fee simple of that certain parcel of real property described as Lot numbered One (1) in Block numbered Two Hundred and Twelve (212) of the City of Portland, Oregon, and its appurtenances and

Whereas, Lucy A. H. Deady died on or about August 29, 1923, leaving a last will and testament made, executed and declared as such and dated July 29, 1920, which said last will and testament has been duly admitted to probate in the Probate Department of the Circuit Court of the State of Oregon for Multnomah County and

Whereas, in and by said last will and testament an undivided two-thirds of said real property was devised to the said Henderson Brooke Deady and an undivided one-third of said real property was devised to Hanover Deady and Matthew Edward Deady, of the parties of the second part, said devises being subject to certain conditions, provisions and charges in said will contained and

Whereas, Henderson Brooke Deady died testate on or about May 26, 1933, and his last will and testament has been duly admitted to probate in the

sold, assigned, transferred or conveyed the estate and interest hereby conveyed to them in any respect or to any person whomsoever, and that she will warrant and defend the same against the lawful claims of all persons whomsoever claiming under or through her.

The said Hanover Deady and Ariel Deady, his wife, and the said Matthew Edward Deady and Margaret Deady, his wife, do hereby give, grant, bargain, sell, convey and confirm unto Charlotte Howell Deady a life estate in an undivided two-thirds interest in said real property and its appurtenances, and in and to the rent, income and profits therefrom, subject only to the charges made upon said income, rents and profits in favor of Mary E. Deady (widow of Edward Nesbith Deady), and Marye Thompson Deady (widow of Paul R. Deady, deceased). And the said Hanover Deady and Ariel Deady, his wife, and the said Matthew Edward Deady and Margaret Deady, his wife, each for himself or herself does hereby covenant to and with the said Charlotte Howell Deady that he or she has not heretofore mortgaged, assigned, sold, transferred, conveyed or encumbered the estate or interest hereby conveyed to the said Charlotte Howell Deady in any respect or to any persons whomsoever.

It is further mutually understood and agreed between the parties hereto that from the income, rents and profits arising from said real property there shall be paid, first, the taxes and assessments ac-

crued and to accrue against and upon the same, and the interest on the mortgage now a lien on said premises and that the trustee under the will of Lucy A. H. Deady may in his discretion set aside as a sinking fund and pay on said mortgage a sum not exceeding \$1200.00 per annum; second, such other expenses as may be incident to the care of said property and the administration of the estate of Lucy A. H. Deady, deceased; third, the sum of \$150.00 per month to Mary E. Deady during the remainder of her natural life, and the sum of \$150.00 per month to Marye Thompson Deady during the remainder of her natural life; and fourth, that the remainder of said rents, income and profits shall go and be paid, during the remainder of the natural life of Charlotte Howell Deady, two-thirds to Charlotte Howell Deady and one-sixth to Hanover Deady, his heirs, executors, administrators and assigns, and one-sixth to Matthew Edward Deady, his heirs, executors, administrators and assigns.

The parties hereto further mutually covenant and agree that on the death of Mary E. Deady the sum of \$150.00 per month theretofore paid her from the income, rents and profits of said real property shall go and be paid two-thirds to Charlotte Howell Deady and one-third to Hanover Deady and Matthew Edward Deady, share and share alike, and that on the death of Marye Thompson Deady the sum of \$150.00 per month theretofore paid to her from the income, rents and profits of said real property shall go and be paid two-thirds to Charlotte

Howell Deady and one-third to Hanover Deady and Matthew Edward Deady, share and share alike.

In Witness Whereof, the parties hereto have hereunto set their respective hands and seals this 11th day of October, 1934.

(Seal) CHARLOTTE HOWELL DEADY
Party of the first part.

(Seal) MATTHEW EDWARD DEADY
Parties of the Second Part.

Witness the signature of Charlotte Howell Deady:

ETHEL F. ANDERSON
HELEN A. DODD.

Witness the signatures of Hanover Deady and Ariel Deady, his wife, and Matthew Edward Deady and Margaret Deady, his wife:

R. W. WILBUR.

State of Connecticut,
County of Litchfield—ss.

Be It Remembered that on this 11th day of October A. D. 1934, before me, the undersigned a Notary Public in and for said County and State, personally appeared the within named Charlotte Howell Deady, who is known to me to be the identical individual described in and who executed the within instrument, and acknowledged to me that she executed the same freely and voluntarily.

In Testimony Whereof, I have hereunto set my hand and notarial seal the day and year last above written.

(Seal) HELEN A. DODD,

Notary Public for Litchfield County.

My commission expires Feb. 1, 1936.

State of Oregon,

County of Multnomah—ss.

Be It Remembered that on this 2nd day of November A. A. 1934, before me, the undersigned a Notary Public in and for said County and State, personally appeared the within named Hanover Deady and Ariel Deady, his wife, and Matthew Edward Deady and Margaret Deady, his wife, who are known to me to be the identical individuals described in and who executed the within instrument, and acknowledged to me that they executed the same freely and voluntarily.

In Testimony Whereof, I have hereunto set my hand and notarial seal the day and year last above written.

.....
Notary Public for Oregon.

My commission expires:.....

State of Connecticut,

Litchfield County—ss.

I. C. Wesley Winslow, Clerk of the County of Litchfield and of the Superior Court of said State

within and for said County, which is a Court of Record, and Keeper of the Seal thereof, do hereby certify that Helen A. Dodd whose name is subscribed to the certificate or proof of acknowledgment of the annexed instrument, was at the time of taking such proof or acknowledgment a Notary Public within and for said State, dwelling in said County, duly appointed, commissioned, and sworn, with authority by the laws of this State to administer oaths, for general purposes, and to take the acknowledgment of deeds or conveyances, for land, tenements or hereditaments and instruments to be recorded in this State; that I am well acquainted with his handwriting and verily believe the signature to the said certificate or proof of acknowledgment to be genuine. Impression of Notarial Seal not required to be filed.

In Testimony Whereof, I have hereunto set my hand and Seal of said Superior Court at Winchester, in said County this 13 day of October 1934.

(Seal) [Illegible]

Clerk.

[Endorsed]: Filed Feb. 21, 1942.

Mr. Grant: The rebuttal case of the plaintiff will consist in the offer of the Plaintiff's Pre-Trial Exhibits 4, 5, 8 and 9, I believe,—No. 9 and 10, the letter, the letter of Mr. Simon.

Mr. Jaureguy: No objection to these four exhibits which have just been offered by the plaintiff.

The Court: Admitted in evidence.

(Carbon copy of letter, bearing date June 7, 1935, Maguire, Shields & Morrison to Ralph W. Wilbur, Attorney for Hanover Deady and Matthew Edward [370] Deady, so offered and received, having previously been marked as Plaintiff's Pre-Trial Exhibit 4, was thereupon marked received as Plaintiff's Exhibit 4)

PLAINTIFF'S PRE-TRIAL EXHIBIT No. 4

June 7th, 1935

Mr. Ralph W. Wilbur,
Attorney for Hanover Deady and
Matthew Edward Deady,
Board of Trade Building,
Portland, Oregon.

In re Deady Estate.

My dear Sir:

Some months ago Charlotte Deady, widow and sole heir at law of Henderson Brooke Deady, made a certain offer of compromise to Hanover Deady and his brother, Matthew Edward Deady, relating to the various estates and interests of the parties in the Deady estate and tendered a proposed contract and deed of settlement to them through you. This contract and deed has not been executed or

accepted by your clients or delivered to us although request has been repeatedly made for such acceptance, execution and delivery.

As I heretofore informed you, this offer was not a standing one and was conditioned upon immediate acceptance and by failure on the part of your clients so to do, was of no further force and effect. In view of the failure of your clients to accept the same and to execute and deliver the contract and deed, we again notify you on behalf of our client, Mrs. Charlotte Deady, that said offer of compromise is withdrawn and request immediate return to us of the papers tendered.

We do not desire to be understood that we do not still stand ready to discuss with you and your clients the compromise of this controversy but until such discussion and agreement has been reached, our client insists upon maintaining all of her rights and claims in the premises.

Very truly yours,

MAGUIRE, SHIELDS &
MORRISON

By ROBERT F. MAGUIRE.

RFM-D

Letter, bearing date June 7, 1935, Wilbur, Beckett, Howell & Oppenheimer to Robert F. Maguire, so offered and received, having previously been marked as Plaintiff's Pre-Trial Exhibit 5, was thereupon marked received as Plaintiff's Exhibit 5;

PLAINTIFF'S PRE-TRIAL EXHIBIT No. 5

R. W. Wilbur
H. B. Beckett
F. C. Howell
E. K. Oppenheimer
Francis E. Marsh
Robert T. Mautz
Calvin N. Souther

Wilbur, Beckett, Howell & Oppenheimer
Attorneys at Law
Board of Trade Building
Portland, Oregon

June 7, 1935

Mr. Robert F. Maguire,
c/o Maguire, Shields & Morrison,
Public Service Bldg.,
Portland, Oregon.

Dear Sir:

In re Deady Estate.

Your letter of the 7th inst. about the above received and note what you say about returning the contracts which were signed by your clients and forwarded to us for out clients.

As you know, our clients signed the first set of contracts which were forwarded to you and by you sent to your clients and these signed contracts have never been returned to us.

When the second contract was drawn, you forwarded them to your client in the East who executed them and they were forwarded to us.

I recognize that neither set of contracts have been fully executed and there has been no delivery. If the contracts signed by the respective parties are to be returned, we think the only fair and proper thing to do is to have your clients forward to you the contracts signed by our clients and we will then instruct our clients to deliver to you those which were signed by your clients.

I understand thoroughly from your letter that as the matter stands now all efforts of compromise are at an end except as we may possibly in the future discuss the matter and come to some understanding.

Relative to the inheritance taxes which the State Treasurer is now trying to impose against this estate, this seems to me very serious not only for your clients but every one concerned and since our interests lie together in this tax matter, we would like to be kept posted as to what, if anything, is to be done and if any hearing is to be had, would like to be notified so that we may be represented at the hearing. I hope it may be possible for us in the future to get together in some way for a compromise.

Yours very truly,

WILBUR, BECKETT, HOWELL &
OPPENHEIMER,

By R. W. WILBUR.

RWW/P

[Endorsed]: Filed Feb. 21, 1942.

Letter, bearing date July 15, 1933, Wilbur, Beckett, Howell & Oppenheimer, by R. W. Wilbur, to Joseph Simon, so offered and received, having previously been marked as Plaintiff's Pre-Trial Exhibit 9, was thereupon marked received as Plaintiff's Exhibit 9;

PLAINTIFF'S PRE-TRIAL EXHIBIT No. 9

R. W. Wilbur
H. B. Beckett
F. C. Howell
E. K. Oppenheimer
Francis E. Marsh

Wilbur, Beckett, Howell & Oppenheimer
Attorneys at Law
Board of Trade Building
Portland, Oregon

July 15, 1933

Hon. Joseph Simon,
Mohawk Bldg.,
Third & Morrison Sts.,
City.

My dear Mr. Simon:

In re Estate Henderson Deady

We are informed that Mr. Henderson Deady recently died in the East and his Will is here for the purpose of probate. The last we knew, this Will had not been offered for probate and do not know the exact situation at the present time.

We note from the Will of Lucy Deady that you and Henderson Deady were made the executors of the Last Will and Testament and therefore, assume that you are still acting and alone now handling this property since your co-executor is dead.

I note from the seventh paragraph of the Lucy Deady Will that in case Henderson Deady dies without issue, the undivided two-thirds of Lot 1, in Block 212 shall vest in her two grandsons, to-wit, Matthew Edward and Hanover Deady.

Our information is that Mr. Henderson Deady died without issue and therefore, there can be no question but what the ultimate title to this property will vest in and probably has already vested in the two grandsons subject to the limitations and provisions in the Lucy Deady Will and also as the same may or may not be affected by the Will of Henderson Deady.

In the ninth paragraph of the Lucy Deady Will it is stated, referring to paragraph five of the Will, that money is to be paid to Henderson Deady as is provided in said item five and shall continue for a period of ten years after her death and that thereafter and thereupon the net income shall follow the title and ownership of said real property.

Mr. Henderson Deady left a Will in which he willed his interest in his estate to his wife, Charlotte Deady, but Mr. Henderson Deady died prior to the expiration of the ten-year period above referred to which we understand will expire with the coming month of August.

We represent the two grandsons in this matter and have taken no decided stand or position relative to this matter but an interesting question has naturally been raised and discussed as to whether or not if Henderson Deady died prior to the ten years provided for in the Will and the title of the property after said death resting in the said grandsons, Henderson Deady had any right to will to his wife any portion of the income from the property after the expiration of the ten years.

You are the executor of this estate and also the trustee for managing the same and we assume that you are aware of this situation and are probably thinking of what your position will be at the expiration of the ten-year period in August, 1933. If you have examined these Wills and have come to any conclusion we would be very glad to hear from you about the matter.

As I have said before and want to say again, the grandsons have not expressed to us any particular desire to be either hardboiled or unfair in the solution of this question but feel that as a matter of law and right that the question should be solved right or in some manner which is agreeable to all parties.

We understand that the Henderson Deady Estate is represented by Mr. Robert Maguire and he may confer with you and we will be very glad to confer with you at any time and also with Mr. Maguire if you desire and it is possible that a

solution of this entire question may be had which is agreeable to all parties.

Yours very truly,

WILBUR, BECKETT, HOWELL &
OPPENHEIMER

By R. W. WILBUR.

RWW:S

[Endorsed]: Filed Feb. 21, 1942.

Letter, bearing date July 17, 1933, Joseph Simon to Robert Maguire, so offered and received, having previously been marked as Plaintiff's Pre-Trial Exhibit 10, was thereupon marked received as Plaintiff's Exhibit 10;

PLAINTIFF'S PRE-TRIAL EXHIBIT No. 10

Joseph Simon

John M. Gearin

Lester W. Humphreys

Edgar Freed

John C. Failing

Simon, Gearin, Humphreys & Freed

Attorneys at Law

Mohawk Building

Portland, Oregon

July 17, 1933

Robert Maguire, Esquire,

Attorney at Law,

Public Service Building,

Portland, Oregon.

Dear Sir:

I am enclosing herewith a copy of a letter just received from Mr. Ralph W. Wilbur, of the firm of Wilbur, Beckett, Howell & Oppenheimer, respecting the Lucy A. H. Deady Estate and the Estate of Henderson B. Deady.

As you are undoubtedly aware Dr. Henderson B. Deady under the terms of his mother's Will was entitled to receive two-thirds of the net income of the estate as fixed by the Will during his lifetime.

There is also in the Will of Mrs. Lucy A. H. Deady a provision which seems to authorize Dr. Deady to bequeath by Will the income that he was

to receive to his widow, if there be one, for her life.

There seems to be some uncertainty as to the proper construction of this Will so far as it affects Dr. Henderson B. Deady's interest and his right to bequeath the income after his death to his widow, by reason of the language employed in paragraphs eight and nine of the Will.

Mr. Wilbur, who represents Matthew E. Deady and Hanover Deady, has suggested that a conference should be had over the present situation, and especially what disbursement should be made of the income formerly paid to Dr. Deady after the death of Mrs. Lucy A. H. Deady, the conference to consist of Mr. Robert Maguire, Mr. R. W. Wilbur and Joseph Simon.

I would be pleased also, if agreeable to you, to have Mr. Robert H. Strong present.

May I hear from you on this subject at an early date.

Very truly yours,
JOSEPH SIMON.

JS:B

[Endorsed]: Filed Feb. 21, 1942.

Mr. Jaureguay: I wonder, then, if we could withdraw the copy of G, since we are putting in the original?

The Court: Yes.

Mr. Grant: We consent to that.

The Court: I think that probably there should be an amendment [371] made of the pre-trial order in that regard, because it does show that there is a copy instead of the original. I think that that should be amended.

Mr. Jaureguy: Now, I take it, your Honor,—at least, I will state that it is our understanding and our desire that if your Honor rules out some of this evidence that has been given we desire it understood that that evidence nevertheless remains, under the equity rule, for the consideration of the Circuit Court of Appeals.

The Court: Oh, yes, that is my intention.

Mr. Jaureguy: And that follows without any further action or exception on our part?

The Court: Yes. I intended that this whole record should be complete.

Mr. Jaureguy: Now, another thing that I would like to do, and that is that the Exhibits A and B were ruled out and offered under the rule. We wish now to re-offer A and B, on the theory that some of the cross-examination of Hanover Deady will perhaps throw some light as to whether or not they ought to be admissible or not, particularly the cross-examination where it was attempted to be brought out that Robert Strong had advised Hanover Deady that Mr. Charlotte Deady claimed or might claim a fee. I am just saying that to identify the evidence and not purporting to be exact in repeating it, but for that reason we reoffer these two

exhibits,—that [372] is, of course, if they are excluded and still go in under the rule.

Mr. Maguire: We submit the same objection as to their receipt on the re-offer.

Mr. Freed: May we have the original of the pre-trial order, so that we can correct it, and your Honor can initial it.

The Court: Yes.

Mr. Jaureguy: I am not urging that that ruling on the re-offer be made now, unless your Honor desires to.

The Court: Well, I will reserve it with all the rest of the rulings, the technical rulings, on the evidence.

Mr. Jaureguy: Yes.

Mr. Freed: Who shall make the change in here? I know your Honor will initial it.

The Court: Well, I don't care who makes it. I will initial it when it is made. Mr. Bailiff, will you pass up the pre-trial order. I have written in here, "Original substituted for copy, 1/24/41". [373]

Mr. Freed: I understand that your Honor will hand down an opinion on this? I mean a formal opinion?

The Court: Yes. I felt that I can advise you at this time what my holdings will be, but I think that, in order that this case may be properly presented and that the Circuit Court of Appeals will have my viewpoint on the evidence, I should like to render—

Mr. Freed: (Interrupting) And you will make your rulings?

The Court: I will make my rulings first. As soon as I get the transcript I will make my rulings on the admissibility or inadmissibility of the evidence.

Mr. Freed: And you won't want any further argument, I assume?

The Court: No, I think not, unless there is some legal point that occurs.

Mr. Freed: Well, we will be advised by your Honor.

The Court: I have given you my viewpoint on the facts. Now, if there are any rules of law that you think are sufficient to change my findings or that give a different view, [375] I will hear you on those, but as I look at it at the present time my viewpoint on the facts is probably controlling of my written opinion on the law.

Mr. Freed: Well, what I have reference to is the estoppel we have pleaded. As I understand the rule of estoppel, it wouldn't make any difference what Mrs. Deady intended in her will or what her will said, that under certain circumstances Henderson Deady could be estopped, and people claiming through him, from making certain claims. I didn't know whether we were foreclosed from arguing that.

The Court: Well, I think that we will let it go at the present, Mr. Freed, and I will make my rulings on the evidence, and then if you still think

that there are legal points that you would like to argue I will hear you.

Mr. Freed: Then we will wait to hear from the Court.

The Court: Yes.

Mr. Freed: I wanted to be sure that we were doing everything that should be done here.

The Court: Yes.

Mr. Freed: Then we are to wait to hear further from the Court as to anything we are to do in connection with the argument.

The Court: Nothing at present.

(Whereupon, at 12:15 o'clock P. M., Friday, January 24, 1941, the trial of the above entitled cause was concluded.) [376]

[Endorsed]: No. 10140. United States Circuit Court of Appeals for the Ninth Circuit. Matthew Edward Deady, Hanover Deady and The First National Bank of Portland, a national banking association, Appellants, vs. Richard Howell, Appellee. Richard Howell, Appellant, vs. Matthew Edward Deady, Hanover Deady and The First National Bank of Portland, a national banking association, Appellees. Transcript of Record. Upon Appeals from the District Court of the United States for the District of Oregon.

Filed May 16, 1942.

Paul P. O'Brien,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals for
the Ninth Circuit.

No. 10140

RICHARD HOWELL,

Appellee,

vs.

MATTHEW EDWARD DEADY, HANOVER
DEADY and THE FIRST NATIONAL
BANK OF PORTLAND, a national banking
association,

Appellants.

STATEMENT OF THE POINTS ON WHICH
THE APPELLANTS INTEND TO RELY

Pursuant to Rule 19 (6) of the Rules of this Court, the appellants present the following statement of the points on which they intend to rely on this appeal:

(1) The amended complaint does not state facts sufficient to constitute a valid cause of suit or action against defendants, and also it appears upon the face of said amended complaint that the suit was not commenced within the time required by law. Defendants' motion to dismiss the amended complaint should therefore have been granted.

(2) The Last Will and Testament of Lucy A. H. Deady clearly gives to Henderson Brooke Deady only a defeasible fee in an undivided two-thirds interest in Lot 1, Block 212, City of Portland, Ore-

gon, subject to be defeated in favor of defendants Hanover Deady and Matthew Edward Deady by the subsequent death of Henderson Brooke Deady without issue; and since Henderson Brooke Deady died without issue, defendants Hanover Deady and Matthew Edward Deady are now the sole beneficial owners of said Lot 1, Block 212.

(3) While appellants contend that the language used in the will is clear in its meaning as set forth in Point 2, appellants also make the point that the evidence introduced at the trial proves also that it was the intention of Lucy A. H. Deady, Deceased, by the language used in her will, to give to Henderson Brooke Deady only a defeasible fee in an undivided two-thirds interest in Lot 1, Block 212, City of Portland, Oregon, subject to be defeated in favor of defendants Hanover Deady and Matthew Edward Deady by the death of Henderson Brooke Deady without issue after the death of Lucy A. H. Deady.

(4) The evidence introduced at the trial proves that Henderson Brooke Deady, Hanover Deady, Matthew Edward Deady, Joseph Simon (mentioned in the will of Lucy A. H. Deady) and The First National Bank, and Charlotte Howell Deady (mentioned in the will of Henderson Brooke Deady), and Robert H. Strong, the Executor of the Estate of Henderson Brooke Deady, at all times construed the will of Lucy A. H. Deady to mean, and the said Lucy A. H. Deady to intend by said will, that Henderson Brooke Deady upon the death of the Testa-

trix received only a defeasible fee in an undivided two-thirds interest in Lot 1, Block 212, City of Portland, Oregon, subject to be defeated by the death of Henderson Brooke Deady without leaving issue.

(5) The evidence in this case also proves the following: Henderson Brooke Deady, from the death of Lucy A. H. Deady to the time of his own death, represented to the defendants Hanover Deady and Matthew Edward Deady that Lucy A. H. Deady, by her will, intended to and did give him (Henderson Brooke Deady) only a defeasible fee in Lot 1, Block 212, City of Portland, Oregon, which would be defeated in favor of Hanover and Matthew upon Henderson's death without leaving issue, and that under the will of said Lucy A. H. Deady he received such an estate in said property, and that upon his death without leaving issue his interest in the property would go to them, subject to the power of appointment in favor of his wife given him in said will; and Henderson Brooke Deady intended them to act upon said representations, and they did act thereon to his benefit and their detriment. Henderson Brooke Deady at all times acquiesced in that interpretation of the will, elected to accept that interest, and waived any other interest. And the Executors of the Estate of Henderson Brooke Deady accepted and acquiesced in that interpretation of the will of Lucy A. H. Deady. And Charlotte Howell Deady accepted, acquiesced in, and elected to take under that interpretation of Lucy A. H. Deady's

will. And the plaintiff is estopped to claim that Henderson Brooke Deady had any other or different estate or interest in the property.

(6) The right of action set forth in the amended complaint is barred by laches, and to allow the plaintiff at the time of the filing of the amended complaint to assert the claim made therein against defendants, or any of them, is contrary to equity and good conscience, because as the evidence in this case shows, from the death of Lucy A. H. Deady in August, 1923, up to the bringing of this suit in July, 1936, the plaintiff and the persons through whom he claims knew that the executors of the estate of Lucy A. H. Deady and the defendants herein considered and were acting upon the basis that Henderson Brooke Deady received under the will of Lucy A. H. Deady only a defeasible fee in Lot 1, Block 212, City of Portland, Oregon, together with the power of appointment given him in said will; and until shortly before the bringing of this suit no claim was made by the plaintiff, or any person through whom he claims, that Henderson Brooke Deady received under said will any other estate in said Lot 1, Block 212. And no such claim was made until after the death of the attorney who prepared the will, the witnesses thereto, the executors named in said will, and other persons having information and knowledge concerning, and who would be able to give testimony to meet, the issues raised by the amended complaint, and until after the loss or destruction of documentary and other evidence bear-

ing on said issues. The testimony of said witnesses and said other evidence are irreplaceable.

(7) The executor of the estate of Henderson Brooke Deady and the Executor or Administrator with the will annexed of the Estate of Charlotte Howell Deady are necessary and indispensable parties in this case.

(8) Each and all the provisions of the Last Will and Testament of Lucy A. H. Deady, Deceased, are valid and should be enforced and carried out.

(9) The Last Will of Lucy A. H. Deady, Deceased, created a valid trust of said Lot 1, Block 212, City of Portland, Oregon, and defendant The First National Bank of Portland, a national banking association, since the 6th day of March, 1936, has rightfully been acting as trustee of said property and is entitled to continue, and it is its duty to continue, in the performance of its duties as such trustee.

(10) All testimony offered by defendants was, and the exhibits offered in evidence by them at the trial were, admissible; and the Court erred in excluding the portions of said evidence and those of said exhibits which it did exclude (see Court's memorandum on admission of evidence, certified record, pages 100 to 106, inclusive).

(11) The decree of the District Court should be reversed and the Circuit Court of Appeals should direct the entry of a decree dismissing plaintiff's amended complaint and further decreeing that defendant, The First National Bank of Portland, is

trustee of and should continue in the possession and management of Lot 1, Block 212, City of Portland, Oregon, as trustee, and that, subject to said trust, defendants Hanover Deady and Matthew Edward Deady are the absolute and unconditional owners of said real property, free and clear of any right, title, claim or interest on the part of the plaintiff; and said decree should further enjoin and restrain plaintiff from making any claim to said real property, or any part thereof, or to the rents or profits arising therefrom, adverse to defendants' said title, and quieting the title of defendants in and to said real property.

SIMON, GEARIN, HUMPHREYS
& FREED
EDGAR FREED
CAKE, JAUREGUY & TOOZE
NICHOLAS JAUREGUY

Attorneys for Appellants.

Service acknowledged this 11th day of May, 1942.
MAGUIRE, SHIELDS, MORRISON &
BIGGS,

Of Attorneys for the Appellee.

[Endorsed]: Filed May 13, 1942. Paul P. O'Brien,
Clerk.

[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF THE POINTS ON WHICH
CROSS-APPELLANT INTENDS TO RELY.

Pursuant to Rule 19 (6) of the Rules of this Court, cross-appellant presents the following statement of the points on which he intends to rely on this appeal:

(1) The District Court erred in holding that the plaintiff and cross-appellant is not entitled to receive any of the income from Lot 1, Block 212, in the City of Portland, Oregon, accruing prior to the death of Marye Thompson Deady.

(2) The District Court erred in refusing to decree that the plaintiff and cross-appellant is now entitled to receive two-thirds ($\frac{2}{3}$) of the present income from said property less such charges and legacies as the Court found to exist at the date of its decree.

(3) The decree of the District Court should be modified so as to award to the plaintiff and cross-appellant two-thirds ($\frac{2}{3}$) of the present income from such property less such charges and legacies as the District Court found to exist at the date of its decree.

ROBERT F. MAGUIRE

RANDALL B. KESTER

MAGUIRE, SHIELDS,

MORRISON & BIGGS

Attorneys for Plaintiff, Ap-
pellee and Cross-Appellant.

State of Oregon,
County of Multnomah—ss:

Service of the foregoing Statement of points by copy, as prescribed by law is hereby admitted at Portland, Oregon, this 21st day of May, 1942.

SIMON, GEARIN, HUMPHREYS & FREED

Attorneys for Defendants, Appellants
and Cross-Appellees.

[Endorsed]: Filed May 23, 1942. Paul P. O'Brien,
Clerk.